

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

* * * * *
MICHAEL E. WYATT, * CIVIL ACTION 7:14-CV-00492
* APRIL 20, 2017 9:28 A.M.
Plaintiff, * JURY TRIAL
* VOLUME III OF III
vs. *
* Before:
JOHNNY OWENS, ET AL., * HONORABLE NORMAN K. MOON
* UNITED STATES DISTRICT JUDGE
Defendant. * WESTERN DISTRICT OF VIRGINIA
* * * * * AND A JURY

APPEARANCES:

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Proceedings recorded by mechanical stenography,
transcript produced by computer.

I N D E X**PAGE NO.**

PLAINTIFF RESTS:

463

DEFENSE EXAMINATION INDEXALLEN SHELTON:

Direct by Mr. Guynn

463

Cross by Ms. Branch

470

Redirect by Mr. Guynn

476

TOMMY NICHOLSON:

Direct by Mr. Guynn

477

Cross by Mr. Beaton

485

Redirect by Mr. Guynn

495

SCOTT WYATT:

Direct by Mr. Guynn

496

ROBERT WORSHAM:

Direct by Mr. Guynn

497

Cross by Mr. Todd

498

1	DEFENSE EXAMINATION INDEX	
2		PAGE NO.
3	<u>ROBERT WERSHBALE:</u>	
4	Direct by Mr. Guynn	500
5	Cross by Mr. Beaton	525
6	Redirect by Mr. Guynn	585
7		
8	<u>DEFENSE RESTS:</u>	586
9		
10	<u>JURY INSTRUCTIONS:</u>	586
11		
12	<u>CLOSING ARGUMENTS:</u>	
13	By Mr. Todd	603
14	By Mr. Guynn	626
15	By Mr. Todd	638
16		
17	<u>VERDICT:</u>	653
18		
19		
20		
21		
22		
23		
24		
25		

1 (Court convened at 9:28 a.m. outside the presence of the
2 jury.)

3 THE COURT: I don't want to particularly argue
4 instructions, but anything you want to bring up right now
5 while we're waiting, we can do it. If you have any comments
6 or anything you'd like us to look over so that the clerks can
7 be thinking about it, what issues we can raise.

8 MR. GUYNN: I do, Your Honor. Your Honor, the
9 defendants submitted three instructions that were not
10 included. And we didn't submit them necessarily as numbered,
11 but they were on separate page numbers, so I'll use the page
12 numbers, if I may, through the ECF record.

13 Page 17 includes the definition of a calculus of
14 reasonableness, which talks about making split-second
15 judgments in circumstances that are rapidly evolving. And I
16 think it includes the language -- that is the language from
17 *Graham v. Connor*. It also includes, I believe -- yeah, the
18 language about 20/20 vision hindsight.

19 I do not find that in the Court's instructions and I
20 would request that be given, because not only is it
21 consistent, but it's an accurate statement of the law from
22 *Graham v. Connor*.

23 Second, on page 18, the second paragraph -- the Court
24 gave the first paragraph regarding intention, but the second
25 paragraph shows that it has to be objectively reasonable from

1 the perspective of a reasonable officer facing the same
2 circumstances. And I didn't see that in the Court's
3 instructions either, and I think that's an accurate statement
4 of the law, that whole second paragraph on 18.

5 THE LAW CLERK: Look at Number 15, "Perspective of a
6 reasonable officer based on the same circumstances of the
7 defendant's . . ."

8 THE COURT: Okay. We know your point. What else?

9 MR. GUYNN: The last one, Your Honor, is our
10 definition of an unreasonable force is Number 19, our page
11 Number 19, and it was the three criteria set forth in *Graham*
12 *v. Connor*. And the criteria used by the Court are many more.
13 And our submission is that the *Graham v. Connor* criteria would
14 be sufficient and that we are going to risk jury confusion, or
15 the jury is going to seize upon one of the others that hasn't
16 been approved by the Supreme Court.

17 THE COURT: All right. I know what to consider.

18 Does the defendant have anything you want us to be
19 looking at while -- I want to get the jury back quick, but --

20 MR. BEATON: Yes, Your Honor. Would you like me to
21 respond to Mr. Guynn or just make our own comments?

22 THE COURT: Well, if you don't object to anything
23 that he has raised, it's okay.

24 MR. BEATON: So we prefer the -- on the two, 17 and
25 19, when he cited *Graham*, we believe that the Fourth Circuit

1 has recognized that what is included in *Graham* is not the
2 limit of the factors that may be considered by the jury; there
3 are additional ones that the Fourth Circuit has recognized.
4 So we would oppose an ability to restrict those tighter than
5 what the Fourth Circuit has allowed. Certainly Mr. Guynn is
6 free to argue some of these more specific points, but the
7 factors are legally justified. That is my only response to
8 what was just raised.

9 And the one issue that we had, we submitted by e-mail
10 last night, and we received an e-mail from James this morning.
11 And I just had one point in response to that. The response we
12 received by e-mail referred to whether credibility was a
13 proper instruction for prior acts under Rule 608(b), and I
14 wanted to clarify for the Court that the prior act evidence,
15 the specific instances, that would not be covered by 608, my
16 understanding, that would be 404(b). And 404 requires
17 specific instances, which is why we put on the evidence.

18 THE COURT: I'll have to work on that instruction.
19 We already have some alternatives that maybe will cover the
20 point.

21 The evidence I admitted concerned the explanation by
22 the defendant as to why he applied force, and it was relevant
23 for the jury to decide whether to believe his version of why
24 he needed to apply force. And I think that covers the mistake
25 and accident and his credibility on that issue too.

1 MR. BEATON: I certainly agree with you with respect
2 to mistake and accident. What I had in mind was the testimony
3 from Mr. Young regarding the repetition of the explanation in
4 those prior instances, which was similar to the explanation in
5 this case.

6 THE COURT: Well, that's sort of why I let it in.
7 But, okay, let's call --

8 MR. TODD: Your Honor, I'm sorry, quickly two brief
9 points at the risk of trying the Court's patience. First, I
10 wanted to let you know we're going to rest as soon as the jury
11 comes in, so we'll move to the defendant's case.

12 Secondly, one issue that arose yesterday that I
13 wanted to flag for the Court. Before trial, Your Honor
14 excluded evidence of the gun that was allegedly found on July
15 10th, the crack pipe, and you not only excluded them, but you
16 instructed defense counsel to instruct his witnesses that they
17 shouldn't testify in any way that insinuated the existence of
18 such evidence.

19 Yesterday we came awfully close to that line, if we
20 didn't actually step across it. I asked Investigator Owens
21 the question whether Mr. Wyatt had a gun in his hand, and I
22 framed the question that way purposely to allow an answer that
23 wouldn't allow any insinuation. The answer was, "Well, he
24 didn't have a gun on his person." It was very close to the
25 line Your Honor drew. I want to make sure that instruction --

1 Your Honor's instruction has been given to the two officers
2 who are going to testify today, Shelton and Nicholson, to make
3 sure they don't come anywhere near that evidence.

4 THE COURT: Are you clear on that, Mr. Guynn?

5 MR. GUYNN: I will go and reiterate.

6 THE COURT: Sir?

7 MR. GUYNN: I told them, but I will reiterate it now.

8 THE COURT: Okay.

9 MR. GUYNN: The other question I have, from a
10 procedural standpoint, I have a Rule 50 motion I would like to
11 make after they rest, but I'd hate to have the jury come in
12 and go back out.

13 THE COURT: If you're going to rest immediately, let
14 him make his Rule 50 motion now and then the jury won't have
15 to go back out.

16 Go ahead, sir.

17 MR. GUYNN: Your Honor, we would move under Rule 50
18 on two bases. One is that qualified immunity is always a
19 decision of the Court. And now the Court has heard all of the
20 plaintiff's evidence, it would be an appropriate time to
21 consider whether or not they acted as reasonable officers
22 would have acted under the same or similar circumstances. And
23 given all the evidence that has been put into place so far,
24 including the testimony of the defendants, I would submit to
25 the Court that qualified immunity does apply in these

1 circumstances and would shield them from liability.

2 The second is that the evidence that has been
3 submitted does not support a claim for punitive damages.
4 Basically, what we've got is three incidents from Officer
5 Worsham that are submitted I think for credibility, but
6 they're not submitted for prior acts is, I guess, what I'm
7 saying. And under those circumstances, there's no support for
8 a claim of punitive damages.

9 I mean, you're talking about a guy who had three
10 complaints of excessive force which weren't substantiated.
11 They were all unsubstantiated. And under the circumstances,
12 there's nothing in what has been said and what evidence is
13 before the Court that would support a claim that there was any
14 malice or any sort of -- that the hallmarks of conduct that
15 would allow a jury to place punitive damages or to consider
16 punitive damages.

17 THE COURT: Okay. Thank you. With regard to the
18 qualified immunity, I will stand by the opinion already
19 written, my earlier decision, and deny the motion in that
20 regard. And I will deny the motion in whole. I think it's a
21 jury issue, so the motion is denied.

22 Ready to call the jury?

23 MR. GUYNN: Your Honor, given that, I'm going to call
24 these two witnesses first. I will be right back.

25 THE COURT: All right.

Shelton - Direct

1 (Jury in at 9:39 p.m.)

2 THE COURT: All right. Good morning, ladies and
3 gentlemen. Good to see you back.

4 We're ready to resume. All right.

5 MR. TODD: Your Honor, the plaintiff rests.

6 PLAINTIFF RESTS

7 THE COURT: All right. Mr. Guynn, you may call your
8 first witness.

9 MR. GUYNN: The defendants call Allen Shelton, Your
10 Honor.

11 THE COURT: All right.

12 THE CLERK: Mr. Shelton, if you would come here and
13 be sworn, please.

14 Would you raise your right hand.

15 ALLEN SHELTON, DEFENDANTS' WITNESS, SWORN

16 DIRECT EXAMINATION

17 BY MR. GUYNN:

18 Q Good morning.

19 A Good morning.

20 Q You're Allen Shelton?

21 A Yes, sir.

22 Q And how are you employed, Mr. Shelton?

23 A I'm employed as an investigator with Pittsylvania County
24 Sheriff's Department.

25 Q What are your duties?

Shelton - Direct

1 A Pardon?

2 Q What are your duties?

3 A We're in special division, so we work with narcotics
4 cases; seizures, which leads to asset forfeitures; serve
5 criminal warrants; and also do extraditions.

6 Q Were you employed by the Pittsylvania County Sheriff on
7 July 3, 2012?

8 A Yes, sir, I was.

9 Q Let me call your attention to that date. Were you
10 assigned that date to look for Michael Wyatt?

11 A Yes, sir.

12 Q What were you told about why you were looking for
13 Mr. Wyatt?

14 A We were told that Mr. Wyatt was armed and -- possibly
15 armed and dangerous. There had been a robbery at a
16 convenience store in Danville, and the -- my bosses told us to
17 go out and start checking areas to see if we could spot a
18 vehicle which he was supposedly driving.

19 Q And so what did you do?

20 A Myself and Investigator Owens were checking motels on
21 Piney Forest Road in Danville, and we eventually came to the
22 Budget Inn Motel and checked the parking lot, and came back up
23 to the upper level of the parking lot, and we spotted the
24 vehicle and verified the tag number that belonged -- that
25 Mr. Wyatt was supposed to be driving.

Shelton - Direct

1 Q What happened next?

2 A We sat there just a minute and Investigator Owens called
3 Sergeant Ford, Captain Nicholson, advised them what we had
4 found, and they were going to head that direction where we
5 were located.

6 And in the meantime, Mr. Wyatt got into the maroon,
7 burgundy Chevrolet and cranked it up. And we were going to
8 pull up beside of it and see if we could, you know, make an
9 arrest.

10 And Mr. Wyatt looked around left and right, and then he
11 just put the vehicle in reverse and backed up real sharply and
12 drove through the parking lot of the Budget Inn, across the
13 grass, onto the parking lot of Taco Bell, which is next door,
14 and then pulled out into Piney Forest Road.

15 Q What did you do?

16 A Investigator Owens went ahead and turned on his lights,
17 siren, and pursued right behind Mr. Wyatt kind of down Piney
18 Forest Road.

19 Q Did Mr. Wyatt stop?

20 A No, sir.

21 Q So what happened after that?

22 A We pursued behind Mr. Wyatt on down Piney Forest Road.
23 At a point in time, Investigator Owens spoke to Investigator
24 Scott Wyatt, for him to take the lead in front of us, behind
25 Mr. Wyatt, which he did.

Shelton - Direct

1 And we came on down Piney Forest Road, coming down into
2 Central Boulevard. At which time we got to the crossover,
3 which would be Memorial Drive. Mr. Wyatt's vehicle jumped the
4 median strip and went up the road a few feet, went onto the
5 ramp backwards, that comes off of Memorial Drive, and followed
6 that up. Come onto Memorial Drive, and then went down, turned
7 left, which put him over on -- I think it's Cahill Court. And
8 that's -- a lot of that property there was owned by Dan River
9 Mills at some time.

10 And as he pulled into the parking lot, Investigator Wyatt
11 was already behind him, and Investigator Wyatt was in a foot
12 pursuit.

13 We stopped. Mr. Wyatt jumped from the doorway of the
14 vehicle, let it roll, which it rolled back and hit, bumped
15 into Investigator Owens' vehicle. Then I jumped out and ran
16 to assist Investigator Wyatt in foot pursuit. At which time
17 we tackled and brought Mr. Wyatt down to the pavement. And --

18 Q Let me ask you a couple of questions to make sure I've
19 got the sequence correctly.

20 You said Scott Wyatt was in a foot pursuit. Was that
21 after or before Michael Wyatt got out of his car?

22 A That was after Michael Wyatt got out of the car.

23 Q And you said that you and Scott Wyatt tackled him. Was
24 he still running away from you at that time?

25 A He was still running away. He was across the parking

Shelton - Direct

1 lot.

2 Q What direction was Michael Wyatt running? Was he running
3 towards Memorial Avenue?

4 A He was running towards the building there that I think
5 Dan River used to own.

6 MR. GUYNN: If I may, Your Honor, we have the exhibit
7 from yesterday.

8 THE COURT: Yes.

9 BY MR. GUYNN:

10 Q Do you recognize that photograph, Mr. Shelton?

11 A Yes, sir.

12 Q If you would --

13 MR. GUYNN: Your Honor, can he touch that screen?

14 THE COURT: You'll have to ask the people that do it.

15 THE CLERK: He can touch it. Do you need him to draw
16 on it?

17 MR. GUYNN: Yes. Can he?

18 THE CLERK: May I show him how?

19 (Discussion off the record between the clerk and
20 witness.)

21 BY MR. GUYNN:

22 Q So you just drew a circle on the exhibit. That's where
23 you were?

24 A This is the -- that was the general area where the
25 vehicles had stopped. And Mr. Wyatt was running that

1 direction.

2 Q Once you and Scott Wyatt tackled Michael Wyatt, did you
3 say anything?

4 A We told him in the pursuit to "Stop. Sheriff's office.
5 You're under arrest." And then we were just shouting, but we
6 were all running also.

7 Q Once you tackled him, what was being said?

8 A Nothing. He never said anything.

9 Q I'm sorry, what did you say?

10 A We were -- got him down, we were telling him to comply,
11 "Give us your hands. Show us your hand. Give me your arm."
12 Gosh, over and over, "Give me your hand. Give me your arm.
13 Give me your hand. Give me your arm."

14 Q Did he?

15 A No.

16 Q Was there anything about the way Michael Wyatt was
17 running that struck you as unusual?

18 A Mr. Wyatt was running with his right hand down his
19 waistband of his pants.

20 Q And why was that unusual to you?

21 A That's the first time I've ever had anybody do that, run
22 away. And I thought, according to the information given out
23 prior that, you know, he could possibly still be armed.

24 Q Now, once you tackled Mr. Wyatt, did you end up on top of
25 him?

Shelton - Direct

1 A I was on his buttocks and the right thigh.

2 Q And was he resisting when you were on his buttocks and
3 right thigh?

4 A Yes, sir, he was resisting.

5 Q What was he doing?

6 A He was trying to raise up, trying to move the right leg
7 to, I guess, get up. He would not give the right arm, let us
8 have the right arm, the right hand. And we just kept
9 shouting, "Give me your hand. Give me your arm."

10 Q Now, from your vantage point, what else did you see? Who
11 else showed up?

12 A Let's see. Investigator Owens and Investigator Robert
13 Worsham and Captain Nicholson.

14 Q And did you see any of the officers use strikes on
15 Michael Wyatt?

16 A That would have been Investigator Owens and --

17 Q Were you able to see those from where you were?

18 A Pardon?

19 Q Were you able to say those from where you were?

20 A A couple, because he was to my left, and we were still
21 shouting, "Give me your arm. Give me your hand." And
22 Mr. Wyatt would not give his arm or give his hand to us.

23 Q Did you see any other strikes by any other officers?

24 A Investigator Worsham was over to the front. And I think
25 he -- I remember his knee trying to strike up at the upper

Shelton - Cross

1 part of Mr. Wyatt. But, you know, I could not see the contact
2 other than I seen his leg, you know, make a movement.

3 Q Did you strike Mr. Wyatt?

4 A No, sir.

5 Q Were you holding on?

6 A Trying to hold on.

7 Q After Mr. Wyatt was eventually handcuffed, was he
8 unconscious?

9 A No, sir, he was not unconscious.

10 Q Do you know who searched him after he was handcuffed?

11 A Pardon?

12 Q Do you know who searched Michael Wyatt after he was
13 handcuffed?

14 A I do not. I do not know.

15 Q Do you know who moved him to the grass?

16 A I do not.

17 MR. GUYNN: Thank you. Those are my questions, Your
18 Honor.

19 CROSS-EXAMINATION

20 BY MS. BRANCH:

21 Q Good morning, Mr. Shelton.

22 So earlier, during your direct examination, you testified
23 that Michael Wyatt, after exiting his vehicle, ran towards the
24 building. Is that your testimony?

25 A Michael Wyatt exited the vehicle?

1 Q And ran towards the building. Am I correct that that's
2 your testimony?

3 A He run across the parking lot towards the building, yes.

4 Q But Mr. Wyatt in fact, when he exited his vehicle, ran
5 towards Memorial Drive, didn't he?

6 A His vehicle was at an angle, and then the vehicle rolled
7 back.

8 Q Right. I'm just asking the direction in which Mr. Wyatt
9 ran. Isn't it true that Mr. Wyatt, after exiting his vehicle,
10 ran towards Memorial Drive, towards the grassy area?

11 A Oh, he did, that's correct. He ran up at the top of this
12 parking lot here and turned around and come right back and ran
13 towards the building.

14 Q So it's your testimony that after exiting his vehicle he
15 actually ran towards Memorial Drive; is that correct?

16 A Yeah. Yeah, that's correct.

17 Q Now, you discussed earlier when you and Johnny Owens were
18 in the parking lot of the motel -- I want to talk about that a
19 little bit. When you were in the parking lot of the Budget
20 Inn Motel, you never exited your vehicle, correct?

21 A No.

22 Q You never announced yourself as a police officer?

23 A I did not.

24 Q And Mr. Owens never announced himself as a police
25 officer?

Shelton - Cross

1 A I do not know. I was --

2 Q But to your recollection --

3 A I had stepped out of my vehicle to the parking lot, just
4 stepped out onto the parking lot --

5 Q So you did exit your vehicle?

6 A But I did not -- I still had, like, my left foot still up
7 there. I could see Mr. Wyatt starting to move to get back in
8 the Chevrolet. And I don't know if Investigator Owens shouted
9 anything or not.

10 Q You did not announce yourself as a police officer?

11 A I did not.

12 Q And you were wearing plain clothes?

13 A Plain clothes with my badge on.

14 Q And did you ever -- but you never showed your badge out,
15 you never announced yourself as a police officer and said,
16 "Here's my badge"?

17 A No, ma'am.

18 Q And the Ford Explorer that you were riding in, it was an
19 unmarked police vehicle?

20 A It was an unmarked vehicle.

21 Q And you also testified that at some point Mr. Owens
22 activated his police sirens and his light?

23 A He did.

24 Q And, in fact, the police siren and the lights were
25 activated after Mr. Wyatt left the parking lot; isn't that

1 true?

2 A Investigator Owens activated the lights and siren on his
3 Ford Explorer while we were in the Taco Bell parking lot, and
4 Mr. Wyatt is starting to drive -- to drive off onto Piney
5 Forest Road.

6 Q So just to clarify, the lights and sirens were activated
7 after Mr. Wyatt's vehicle had already started moving?

8 A Yes.

9 Q So you testified earlier that when you were in the
10 parking lot on Cahill Court, you assisted Scott Wyatt in
11 tackling Mr. Michael Wyatt, correct?

12 A Yes, ma'am.

13 Q And, again, he exited his vehicle, ran towards Memorial
14 Drive?

15 A That's correct. Yes, ma'am.

16 Q And during this tackle, you grabbed Michael Wyatt's legs;
17 isn't that right?

18 A I grabbed at the waist and just slid down the legs and
19 onto the pavement.

20 Q And when you had control of Michael Wyatt's legs, you
21 then put a knee on top of his lower back, buttocks area,
22 controlling his lower body?

23 A I had my knee there, but I was trying to control his --

24 Q But you were, in fact, on top of his buttocks and legs?

25 A The buttocks and right thigh, yes, ma'am.

1 Q And while you were holding Michael Wyatt's legs, Scott
2 Wyatt was holding Michael Wyatt's upper body; isn't that
3 right?

4 A Scott Wyatt, Investigator Wyatt, was holding the upper
5 part of his body. He was on the pavement, on the bottom with
6 Michael Wyatt. I was trying to hold the buttocks --

7 Q So you were located -- sorry, I didn't mean to interrupt.

8 A And at that point, my legs are straddled of his right
9 thigh, on the pavement.

10 Q And you also mentioned earlier that Johnny Owens and
11 Captain Nicholson joined you and Mr. Wyatt and Mr. Michael
12 Wyatt, correct?

13 A I'm sorry, I didn't --

14 Q At some point, Investigator Owens and Captain Nicholson
15 came over and also joined you and Investigator Wyatt, correct?

16 A Yes, ma'am, that's correct.

17 Q And at this point, you were still holding Michael Wyatt's
18 legs. You were around the lower part of Mr. Michael Wyatt's
19 body, correct?

20 A I'm trying to hold his leg, yes, ma'am.

21 Q And you mentioned earlier that you saw Investigator Owens
22 strike Mr. Wyatt, correct?

23 A Yes, ma'am.

24 Q And while Investigator Owens was striking Michael Wyatt,
25 you were still holding Michael Wyatt's legs, correct?

1 A Yes, ma'am.

2 Q You also mentioned earlier that Robert Worsham joined you
3 and Scott Wyatt and Captain Nicholson and Johnny Owens at some
4 point, correct?

5 A Yes, ma'am.

6 Q And you also mentioned that you saw Investigator Worsham
7 strike Michael Wyatt with his knee, correct?

8 A I saw his knee in motion. As far as seeing the strike, I
9 cannot say, but I seen his knee in motion towards his upper
10 body.

11 Q And while Investigator Worsham was striking Michael
12 Wyatt, you continued just to hold Michael Wyatt's legs to the
13 ground, correct?

14 A I was just trying to hold his leg, that's it.

15 Q And you continued to control Michael Wyatt's legs
16 throughout the incident? At no point did you let go?

17 A Trying to hold. I'm not controlling. I'm trying to go
18 hold.

19 Q You're over beside his legs, holding them to the
20 pavement?

21 A Yes, ma'am.

22 Q You never punched Michael Wyatt?

23 A No, ma'am.

24 Q And you never kicked Michael Wyatt?

25 A No, ma'am.

Shelton - Redirect

1 Q And you never kneed Michael Wyatt?

2 A No, ma'am.

3 Q Your only role was to hold Michael Wyatt's legs?

4 A Yes, ma'am.

5 MS. BRANCH: No further questions.

6 THE COURT: Okay. Thank you.

7 REDIRECT EXAMINATION

8 BY MR. GUYNN:

9 Q All right, Allen, you've confused me. Which direction
10 was Michael Wyatt running when you tackled him?

11 A When he bailed out -- when Michael bailed out of the car,
12 he ran up just towards the edge of this grass. He looked back
13 at us, turned in the parking lot, come back down and started
14 running towards the building, that area, which at that point
15 our vehicle was, like, right over here. So I'm already coming
16 across here to help Scott, assist Scott tackle Mr. Wyatt. So
17 we actually end up in the parking lot right there.

18 Q So when you tackled him, which direction was he running?

19 A That would have been running back towards north.

20 Q I'm sorry?

21 A Pardon?

22 Q I didn't hear you. When you tackled him, was he running
23 toward the building or was he running towards --

24 A He was just running towards the building. He was going
25 across the parking lot.

Nicholson - Direct

1 MR. GUYNN: That's all I have.

2 THE COURT: All right. Thank you. You may step
3 down.

4 MR. GUYNN: Tommy Nicholson, Your Honor.

5 THE CLERK: Mr. Guynn, did you want me to leave the
6 annotations here or clear them out?

7 MR. GUYNN: No, you can clear them.

8 THE CLERK: If you will come and be sworn, please.

9 TOMMY NICHOLSON, DEFENDANTS' WITNESS, SWORN

10 DIRECT EXAMINATION

11 BY MR. GUYNN:

12 Q Please state your name.

13 A Tommy Nicholson.

14 Q How are you employed?

15 A I'm a major with the Pittsylvania County Sheriff's
16 Office.

17 Q I'm going to get you, when you answer, to make sure
18 you're leaning toward that mic so I can hear you.

19 How long have you been with the Pittsylvania County
20 Sheriff's Office?

21 A I started in 1982.

22 Q What are your duties -- what were your duties on July 3,
23 2012?

24 A I was in charge of the Special Investigations Unit.

25 Q What does the Special Investigations Unit do?

Nicholson - Direct

1 A Investigate drug crimes and violent crimes.

2 Q Where is it located with relation to the sheriff's
3 office?

4 A Just one building over from the sheriff's office.

5 Q So are you in the same office and see the sheriff on a
6 daily basis when you're in the investigations office?

7 A No, sir.

8 Q How about the rest of the command staff? IA, things like
9 that, do you see them?

10 A No, sir.

11 Q Now, calling your attention to July 3, 2012, did you
12 receive an assignment that morning?

13 A Yes, sir, I did.

14 Q What assignment did you receive?

15 A To try to locate a Michael Wyatt.

16 Q Why?

17 A He was a suspect in several of our break-ins in the
18 county, and also received information that he was wanted out
19 of the City of Danville for an armed robbery.

20 Q Did you have any information about the armed robbery?

21 A Other than that they considered him armed and dangerous,
22 and that a gunshot had gone off when he robbed the store the
23 night before.

24 Q Now, what significance was that information to you?

25 A That he was dangerous.

Nicholson - Direct

1 Q So what did you do?

2 A I called my sergeant and asked him to call the rest of
3 the guys that work in our unit, and we started looking for
4 him.

5 Q Describe for the jury the process of looking for him.

6 A We divided up in two-man cars and just started going to
7 all the known locations where we thought he would be at, and
8 started talking to people and just trying to find out where he
9 was last seen at.

10 Q Did there come a time when somebody found him?

11 A Yes, sir.

12 Q Okay. What do you know about that? What were you told?
13 Did you hear a call?

14 A I heard a call from Johnny Owens that they had found his
15 vehicle at the Budget Motel up there on Piney Forest Road.

16 Q And what did you do next?

17 A I was with Officer Scott Wyatt, we started heading that
18 way. And just a few seconds later, they called and said that
19 he had seen them and he jumped in his car and took off.

20 Q What did you and Scott Wyatt do?

21 A We cut through and got on Piney Forest Road and got
22 behind him somewhere right there around Kentucky Fried Chicken
23 on Piney Forest Road.

24 Q And did you turn on your lights and siren?

25 A Lights and siren was on. And we were the second car

Nicholson - Direct

1 right behind him, pursuing him.

2 Q Did that change at any time, that you were the second
3 car?

4 A Well, when we first caught up, Johnny and Allen Shelton
5 was in a white Ford Explorer, and we were in a Nissan Altima.
6 We decided it would be better for us to take the lead and get
7 right behind Michael Wyatt since we were not in a four-wheel
8 drive. So we got behind him, and Johnny and Allen was behind
9 us.

10 Q Now, when you were behind Investigators Shelton and
11 Owens, could you tell whether or not the lights were on on the
12 SUV, that is, the emergency lights?

13 A The lights and siren were on both of the vehicles, yes,
14 sir.

15 Q So how did the pursuit end?

16 A We went around -- we went through a lot of different
17 roads. I don't know the name of them, a lot of residential
18 areas, and finally ended up back on Piney Forest Road. And he
19 was going -- I can't think of the road, where you cross the
20 bridge at the mall and going like you're going to 86.

21 And then he crosses over the -- there's a metal -- I mean
22 a concrete barrier in between the roads. His car crossed over
23 that concrete barrier and then went up the ramp that comes
24 down to get back on the road. He went up the wrong way on the
25 ramp. Our car was too low to the ground to try to cross it,

Nicholson - Direct

1 so Scott and I went on up, come around the ramp like you're
2 supposed to, and then we met him when he was coming off the
3 ramp the wrong way, and he was on the wrong side of the road.
4 We kind of all got there right at the same time.

5 Q So where did the pursuit end?

6 A It ended on Cahill Court, was the name of the road. And
7 that was just a little off road.

8 Q What did Mr. Michael Wyatt do when he got to Cahill
9 Road -- Cahill Court?

10 A When we pulled in to Cahill Court, we were kind of right
11 behind him. His car had slowed down. All of a sudden, the
12 driver's door comes open to his car and I see Mr. Wyatt; he's
13 got his one arm on the door and his foot in the doorjamb, like
14 he is ready to jump out. And then all of a sudden the car --
15 I seen it lunge a little bit, and the door come back and it
16 looked like it hit him. And the car slowed down, and as soon
17 as it slowed down a little bit more, the door flew all the way
18 open and he jumped out of his car while the car was still
19 going forward.

20 Q And what did you do?

21 A I was sitting in the front seat of Scott Wyatt's car. I
22 was the closest one to him, and I had my gun out.

23 Q Why?

24 A Because what I knew about Scott being -- I mean Mr. Wyatt
25 being considered armed and dangerous, and what we had just

1 gone through with the high-speed chase, I thought there was
2 going to be a gunfight there.

3 Q Was there anything unusual about the way that Michael
4 Wyatt was running?

5 A When he got out of the car, I never could see his right
6 hand. And when he was running, his right hand stayed in front
7 of him. I never did see his right hand. And, you know, the
8 motions when he was running, his right hand was not making the
9 same motion as his left hand.

10 Q Did you believe he had a gun?

11 A I did.

12 Q What happened next?

13 A He got out of my sight for a few seconds. And I was
14 getting out of the car and I had run up to where they were at
15 on the ground.

16 Q When you say "Where they were at on the ground," who was
17 on the ground?

18 A They were -- Scott Wyatt, Johnny Owens, and Allen
19 Shelton.

20 Q So you were the fourth there?

21 A Yes, sir.

22 Q Was your gun out when you ran up?

23 A It was out when I got up there to them, and then I
24 holstered my gun before I knelt down beside Mr. Wyatt.

25 Q Why did you holster your gun?

1 A Because there were officers all around him, and there
2 wouldn't have been nowhere -- you know, nothing I could have
3 done with my gun.

4 Q When you knelt down, what did you do?

5 A I reached down and tried to pull his right hand out from
6 under him, and I couldn't budge his right hand.

7 Q What was being said as you ran up and as you tried to
8 pull his right arm out?

9 A Well, everybody, including myself, was hollering, "Quit
10 resisting." "Show us your hands." "Give us your hands."
11 "Quit resisting." We hollered that the whole time we were
12 there.

13 Q And did Michael Wyatt quit resisting?

14 A No, he did not.

15 Q Did you observe Johnny Owens strike Michael Wyatt?

16 A I seen hand movements; but to say striking him or where
17 he struck him at, I couldn't say.

18 Q How about Scott Wyatt?

19 A I couldn't see -- Scott was on the other side, the
20 left-hand side of him. I couldn't see what Scott was doing.

21 Q At some point, Robert Worsham gets there?

22 A Yes, sir.

23 Q Were you still trying to get the arm out when Officer
24 Worsham got there?

25 A I was.

1 Q What happened next?

2 A When Worsham got there, he got right beside me where I
3 was at, so I got up and moved out of Robert's way so he could
4 try to get his hand out.

5 Q Now, when you say right where you were at, where were you
6 in relation to Michael Wyatt's body?

7 A I was on his right-hand side, down on my knees, right
8 about his waistline, or somewhere in there, trying to jerk his
9 hand out.

10 Q Did you see Robert Worsham use a knee strike?

11 A I did.

12 Q What did he hit?

13 A It looked like he was hitting his arm or somewhere up in
14 there.

15 Q When you say "up in there," for the record you were --
16 like his underarm area?

17 A Yes, sir.

18 Q Or below his -- yeah, below his underarm area?

19 A Yes, sir.

20 Q Maybe even in the rib?

21 A Well, possible. I mean, I really can't say for sure
22 where his knees were going, just in that area.

23 Q Did you see him hit his head, hit Michael Wyatt's head?

24 A I did not.

25 Q Would you have seen it if it happened?

Nicholson - Cross

1 A I feel like I would have, but I'm not sure.

2 Q You had a clear view of it?

3 A Yeah.

4 Q Now, after Robert Worsham used the knee strikes, did the
5 right arm come out?

6 A Yes, sir.

7 Q And after that arm was out, did anybody else strike
8 Michael Wyatt?

9 A No, sir. He was handcuffed and that was it.

10 Q Was he searched?

11 A At some point in time, he was, yes, sir.

12 Q Were you there when he was searched?

13 A I don't recall if I was standing there when he was
14 searched or not.

15 Q Do you know who searched him?

16 A I do not.

17 Q But you didn't?

18 A I did not.

19 Q Do you know who moved him to the grass?

20 A I think it was Gerald Ford and Randy Harris.

21 MR. GUYNN: Those are my questions, Your Honor.

22 THE COURT: All right.

23 CROSS-EXAMINATION

24 BY MR. BEATON:

25 Q Good morning, sir.

1 A Good morning.

2 Q You were the commanding officer on the scene for the
3 Michael Wyatt arrest, correct?

4 A I was.

5 Q Senior officer from the county?

6 A I was.

7 Q And you were the boss of these three defendants and
8 Mr. Shelton, correct?

9 A I was.

10 Q When you entered Cahill Court, you took out your gun,
11 didn't you?

12 A Yes, sir.

13 Q Then your car comes to a stop -- or as your car is coming
14 to a stop, you see Mr. Wyatt get out of his car from about
15 20 feet away?

16 A Something like that.

17 Q Right?

18 A Yes, sir.

19 Q You did not see him with a gun? You did not see him with
20 a gun, did you?

21 A I did not.

22 Q Not in his right hand, not in his left hand?

23 A I never could see his right hand. But in his left hand,
24 I didn't see the gun.

25 Q You said a moment ago you couldn't see his right hand?

Nicholson - Cross

1 A That's correct.

2 Q You couldn't see his left hand either, could you?

3 A I could see his hand when he come up and opened the door.

4 Q When he exited the vehicle, you could not see his left
5 hand, could you?

6 A I'm pretty sure I could see his left hand when he got
7 out. I'm not 100 percent sure.

8 Q Excuse me for just one moment.

9 Mr. Nicholson, do you remember when you had your
10 deposition taken in this case?

11 A I do.

12 Q We sat down at the sheriff's office and talked about the
13 case?

14 A I remember.

15 Q And you testified under oath that day, just like you did
16 under oath here this morning, correct?

17 A That's correct.

18 Q And you told the truth?

19 A I tried to.

20 MR. BEATON: May I show the witness his deposition
21 transcript?

22 THE COURT: Why don't you read the question and
23 answer.

24 MR. BEATON: Sure.

25 BY MR. BEATON:

Nicholson - Cross

1 Q Mr. Nicholson, tell me if you were asked this question
2 and gave this answer at your deposition.

3 "Question: Then what did he do with his left arm before
4 he exited the car?"

5 "It looks to me like he -- it looks like to me he used
6 his left arm to open the door and maybe pushed the door open,
7 and he was getting ready to bail out. And then it looked like
8 the car kind of jumped like that, and that's when the door
9 come back and hit him. And then it wasn't just a second after
10 that that the door comes all the way back -- all the way open
11 again and he jumped out."

12 "Question: And you saw him jump out?"

13 "Answer: Yes, sir."

14 Were you asked this question: "Okay. What did he have
15 in his left hand?"

16 Any reason to doubt you were asked that question?

17 A No.

18 Q And any reason to doubt that you gave this answer: "I
19 didn't see anything in his left hand?"

20 A That's right.

21 Q Okay. And the next question -- well, I say -- the
22 questioner says, "Okay."

23 You go on to say: "I can't even remember seeing his left
24 hand."

25 Was that your testimony at your deposition, that you

1 couldn't see his left hand?

2 A You have to go back to the first question you ask about
3 his left hand being outside the door.

4 Q Could you answer my question first, please, sir?

5 A Yeah.

6 Q Is that your testimony?

7 A That's right.

8 Q That you could not see his left hand when he exited the
9 car?

10 A That's right.

11 Q Okay. Next you testified a moment ago that you didn't
12 see Scott Wyatt and Allen Shelton take Mr. Wyatt down to the
13 pavement, correct?

14 A That's correct.

15 Q Because your view was blocked at that point by the SUV,
16 right?

17 A That's correct.

18 Q But this only took a couple of seconds, from when Michael
19 Wyatt got out of his car to when he was face down on the
20 pavement, correct?

21 A That's right.

22 Q When you got out of your car, you did not say anything
23 about a gun, did you?

24 A No.

25 Q You didn't hear any other officer say anything about a

1 gun either, did you?

2 A No, sir.

3 Q When you exited the car, is your gun still out?

4 A My gun is still out.

5 Q Was it still out when you run up to Michael Wyatt and
6 look down and see him on the pavement?

7 A My gun was still out until I got ready to kneel down, and
8 then I holstered it.

9 Q And so when you get there and you look down and you see
10 Mr. Wyatt, what did you do with your gun?

11 A Put it in its -- put it in my holster.

12 Q You holstered it, right?

13 A Yes.

14 Q And you're the only officer who had drawn a weapon at
15 that point, correct?

16 A As far as I know.

17 Q So at this point, Investigator Shelton is holding down
18 Mr. Wyatt -- is on top of Mr. Wyatt's legs and torso area,
19 correct?

20 A That's correct.

21 Q Scott Wyatt is holding his upper body from the left side,
22 correct?

23 A He was on his left side, yes, sir.

24 Q You go to his right side?

25 A Yes, sir.

Nicholson - Cross

1 Q You grab his right arm?

2 A I do.

3 Q That's the right arm that if there was a gun, it would
4 have been in that right arm? That's your testimony, right?

5 A I feel like it.

6 Q Right. So if there's a gun, it's on the right arm,
7 underneath his body. You've got both hands on the right arm,
8 correct?

9 A Right.

10 Q And you're using your body weight to hold him down, to
11 try to control that right arm, correct?

12 A I was trying to pull his right arm out from under him.

13 Q You wanted to keep control of that right arm, correct, so
14 he could be safely handcuffed?

15 A I wanted to get his right arm out so I could see what was
16 in it and get him handcuffed, that's correct.

17 Q Right. You were the one who had control of anybody over
18 the right arm? If anybody had it, you were responsible for
19 it, correct?

20 A At that point, yes, sir.

21 Q And at that point, you don't -- you didn't punch
22 Mr. Wyatt, did you?

23 A No, sir.

24 Q You didn't kick him?

25 A No, sir.

Nicholson - Cross

1 Q You didn't knee him?

2 A No, sir.

3 Q Did you hit him in any way?

4 A No, sir.

5 Q Because you had your hands on his right arm?

6 A I was trying to get his arm out from under him.

7 Q Mr. Nicholson, you've never even had a use of force
8 report in your career, have you?

9 A No, sir.

10 Q So around the same time you arrive on the right, Johnny
11 Owens arrives on the left, correct?

12 A It might have been a second or two difference.

13 Q Within seconds. So at that point, four officers laying
14 hands on Michael Wyatt, correct?

15 A Yes, sir.

16 Q He is face down?

17 A Yes, sir.

18 Q The fifth officer who came up is Robert Worsham, correct?

19 A That's correct.

20 Q At that point, when there's five officers, one suspect,
21 you released your hands from Michael Wyatt's right arm,
22 correct?

23 A I did.

24 Q You stood up?

25 A I did.

Nicholson - Cross

1 Q Did you take your gun back out?

2 A No, sir.

3 Q You didn't, did you?

4 A (Shakes head side to side.)

5 Q You walked around, looked down at the officers and
6 Mr. Wyatt?

7 A I was looking at Mr. Wyatt's hands, trying to see his
8 hands.

9 Q And you testified a moment ago that you did see
10 Investigator Worsham come to that right side and throw those
11 knee strikes, correct?

12 A Yes, sir.

13 Q But you didn't see where they hit, did you?

14 A I did not see where they hit. I just know he ended up in
15 the same location where I was at.

16 Q I thought your testimony was a little unclear earlier
17 when you said, "Well, maybe it was lower, maybe it was
18 higher."

19 But your testimony, sir, is that you do not know where
20 that knee hit the first, second, third, fourth, or fifth time,
21 do you?

22 A I do not know a hundred percent where it hit on, what
23 spot it hit on his body.

24 Q You don't know if it hit his side or his shoulder or his
25 head?

Nicholson - Cross

1 A It was lower than his head, because he was -- Worsham
2 pulled up next to where -- when he got down to where I was at,
3 he was down lower than his head.

4 Q Are you sure of that?

5 A Well, I mean, we can look at the video.

6 Q Let's look at your deposition testimony.

7 At your deposition I asked you:

8 "And where did Worsham strike Michael Wyatt with his
9 knee?"

10 You answered, did you not: "I don't know. The upper
11 body somewhere. I'm not sure where the strikes actually hit
12 at"?

13 Was that your answer?

14 A Yes, sir.

15 Q And then I asked: "Would it have been his rib area?"

16 You answered: "Possibly."

17 I said: "Shoulder?"

18 You said: "I'm not sure."

19 "His head?" I asked.

20 "I don't know."

21 Was that your answer?

22 A It was.

23 Q You don't know where Mr. Worsham's knee hit Mr. Wyatt, do
24 you?

25 A Not a hundred percent.

Nicholson - Redirect

1 Q Thank you.

2 You never saw Michael Wyatt pull a gun out in that
3 parking lot pavement, did you?

4 A No, sir.

5 Q It would not have been okay for an officer to walk up to
6 Mr. Wyatt and shoot him under those circumstances, with five
7 officers, would it have been?

8 A No, sir.

9 MR. BEATON: Nothing further.

10 REDIRECT EXAMINATION

11 BY MR. GUYNN:

12 Q Major, in your experience, what do your officers do if
13 somebody yells "gun"?

14 A I'm sorry, I didn't hear the question.

15 Q If somebody yells "gun," what do your officers do?

16 A If somebody yells "gun"?

17 Q Yeah. If somebody had yelled "gun," what would have
18 happened?

19 A Then everybody is going to pull their gun out.

20 Q Start shooting, aren't they?

21 A Yes, sir.

22 Q Do you ever yell that unless you absolutely, positively
23 see the gun?

24 A No, sir.

25 MR. GUYNN: That's all I have.

S. Wyatt - Direct

1 THE COURT: All right. Thank you. You can step
2 down.

3 MR. GUYNN: Scott Wyatt.

4 SCOTT WYATT, DEFENDANTS' WITNESS, SWORN

5 DIRECT EXAMINATION

6 BY MR. GUYNN:

7 Q Investigator, you're still Scott Wyatt from yesterday?

8 A I hope so, yes, sir.

9 Q I only have -- I'm not going to repeat the things I asked
10 you yesterday, but I did have a couple more questions.

11 When you had tackled Michael Wyatt, I think your
12 testimony was you were up, I guess, on his left side, towards
13 his head; is that correct?

14 A That's correct, sir.

15 Q Where was your head compared to his?

16 A Once we had gotten -- I got flat on the ground, my head
17 was right beside his.

18 Q On the left side of his?

19 A That's correct, sir.

20 Q Now, in the course of this altercation that you had, did
21 Mr. Wyatt's head ever move and strike yours?

22 A No, sir.

23 Q Were you ever aware that anybody hit him in the head
24 other than you?

25 A No, sir.

Worsham - Direct

1 Q You were aware that Robert Worsham was using knee
2 strikes?

3 A I knew something was happening but I couldn't -- I could
4 see his body movement, but I couldn't tell you exactly.

5 Q But you didn't have any movement in Michael Wyatt's head
6 as you saw that happening?

7 A That's correct, sir.

8 Q Thank you.

9 A Yes, sir.

10 THE COURT: Any questions?

11 MR. TODD: No questions.

12 THE COURT: Thank you. You may step down.

13 MR. GUYNN: Call Robert Worsham, Your Honor.

14 THE CLERK: Mr. Worsham.

15 ROBERT WORSHAM, DEFENDANTS' WITNESS, SWORN

16 MR. TODD: Do you have a time you want us to play it,
17 or do you have a time reference?

18 MR. GUYNN: Just before Worsham gets there.

19 MR. TODD: About 20 seconds. Start there.

20 MR. GUYNN: If you can go forward just a little bit.
21 Okay.

22 (Video is played.)

23 DIRECT EXAMINATION

24 BY MR. GUYNN:

25 Q Investigator, you recognize that's your car pulling up?

1 A Yes.

2 Q Let's run it through the knee strikes. Tell the jury
3 what is happening.

4 A As I come up, I see multiple arms pulling at his arm. It
5 seems that I'm sliding in right beside at the time Captain
6 Nicholson was there.

7 Q And does he move?

8 A And he slides out of my way, to his left, which would be
9 lower on him, and I got right exactly where he was and started
10 delivering the knee strikes.

11 Q Did you deliver the knee strikes to Michael Wyatt's head?

12 A No.

13 MR. GUYNN: Those are my questions, Your Honor.

14 MR. TODD: Give me one minute, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. TODD:

17 Q Good to see you again, sir.

18 Today you're 100 percent confident that you did not hit
19 him in the head, right?

20 A Yes.

21 Q Okay. You weren't 100 percent on Tuesday.

22 A I said that it was in his arm, right in that area.
23 Because I was working on his arm, not his head.

24 Q Tuesday you said maybe, but unlikely, hit his head.
25 Today you're 100 percent?

1 A I don't believe there's no way.

2 Q Well, it's in the transcript and the jury heard it. But
3 in view of your testimony today, we'll just go ahead and read
4 your deposition testimony into the record on this point, sir.

5 MR. TODD: Page, Jim, 113, line 20 through 114, line
6 2.

7 "Question: So do you know whether the knee struck
8 him lower in the torso one way or the other?"

9 "Answer: No."

10 "Question: Do you know whether it struck him higher
11 up in the shoulder or the neck?"

12 "Answer: I don't know if it hit him in the shoulder
13 and glanced off and hit him in the head, or if it hit him in
14 the head. I don't know."

15 That was your sworn testimony back then, wasn't it,
16 sir?

17 A Yes.

18 MR. TODD: No further questions, Your Honor.

19 MR. GUYNN: Yes, no more questions.

20 THE COURT: Thank you. You may step down.

21 MR. GUYNN: Your Honor, I have one more witness. If
22 this would be a good time for morning recess, I can check and
23 see if our expert is here.

24 THE COURT: Well, we'll take a recess now. It will
25 be a good time. We can take about 15 minutes.

Wershbale - Direct

1 (Recess taken from 10:35 a.m. until 10:52 a.m.)

2 THE COURT: Call your next witness.

3 MR. GUYNN: Call Robert Wershbale. Wershbale.

4 Sorry, Your Honor, I didn't know whether to already have him
5 in or not.

6 THE CLERK: Sir, if you will come and be sworn.

7 ROBERT D. WERSHBALE, DEFENDANTS' WITNESS, SWORN

8 DIRECT EXAMINATION

9 BY MR. GUYNN:

10 Q Please tell the jury your name.

11 A My name is Robert Drew Wershbale.

12 Q And how are you employed?

13 A I'm employed by the Henrico County Division of Police in
14 Henrico, Virginia, as a patrol lieutenant.

15 Q It's appropriate for me to call you Lieutenant Wershbale?

16 A You may.

17 Q What are your duties with Henrico County?

18 A My primary duties, I serve as a watch commander of the
19 midnight shift in Henrico County, the west end of our county.
20 My secondary duties include serving as an instructor for our
21 academy. Specifically, I'm the chief instructor for defensive
22 tactics. I teach not only our basic recruits, but also our
23 veteran officers, and also do some training and consultations
24 with people internal and external to the police department.

25 Q How long have you -- let me back up a second. How did

1 you become an instructor at your academy?

2 A I first became an instructor in 1998. I became a general
3 instructor, certified by DCJS, which is Department of Criminal
4 Justice Services.

5 After going through the school that you're required to go
6 through to become that, and completing my apprenticeship, I
7 ultimately became the specialty instructor in 1999 for
8 defensive tactics. What that entailed was going through a
9 completely different school that teaches you not only specific
10 tactics that you're trained to utilize in the performance of
11 your duties as a police officer, but how to break those
12 techniques down so you can instruct them to newer students.

13 Q And you said that DCJS, the Department of Criminal
14 Justice Services, certified you?

15 A Yes.

16 Q Are you certified to teach defensive tactics anywhere in
17 the Commonwealth?

18 A I am.

19 Q And what are defensive tactics?

20 A Defensive tactics are techniques that are utilized in
21 order to take control of a situation or a person. It ranges,
22 as far as how we teach it, everything from the way we stand,
23 to command presence, to hands-on techniques, which may be very
24 simple as far as basic control all the way to take-down
25 maneuvers, all the way to techniques that might include having

1 to take somebody's life.

2 Q What is the Department of Criminal Justice Services?

3 A The Department of Criminal Justice Services is the agency
4 of the state that oversees training as it relates to law
5 enforcement-related activities, correctional, deputies, police
6 departments. As far as how we are involved as general
7 instructors or defense tactics instructors, they give us the
8 minimum standards that a person is to be taught.

9 Q Do you continue to teach defensive tactics? Or have you
10 continued to teach defensive tactics from 1999 to the present?

11 A Yes, I have.

12 Q And are you still the lead defensive tactics instructor
13 for Henrico County?

14 A Yes, I've been the lead instructor for Henrico County
15 since 2002.

16 MR. GUYNN: Your Honor, based on his certifications,
17 I would offer Mr. Wershbale as an expert in defensive tactics
18 in Virginia.

19 THE COURT: All right. Any objection that he testify
20 in that field?

21 MR. BEATON: No objection.

22 BY MR. GUYNN:

23 Q How many officers are in the department in Henrico?

24 A Sworn officers, I believe our current complement is right
25 around the 500 mark.

1 Q And how often do you have an academy class?

2 A We typically teach a basic academy, a full academy twice
3 a year. However, as far as defense tactics instruction, we
4 recertify every year. So there is at least one training day
5 every month, three classes a day.

6 Q You said you're the watch commander for the midnight
7 shift?

8 A Yes.

9 Q Does that place you on patrol?

10 A I am in patrol.

11 Q And you actually go out and patrol Henrico County?

12 A I do.

13 Q Do you have occasion or have you had occasion in the last
14 year to use defensive tactics to arrest somebody?

15 A I have.

16 Q Now, in preparing to provide the jury with your testimony
17 in this case, what have you reviewed?

18 A I was provided several materials, one of them being the
19 video that I was able to view. I also received some training
20 records, received copies of various Pittsylvania County
21 policies, received some statements from both defendants and
22 plaintiff as far as their recollection of the events that
23 occurred.

24 Q And what is your understanding of those events?

25 A My understanding of the events were, on the day in

Wershbale - Direct

1 question, that Mr. Wyatt was a wanted felon, that he was
2 considered armed and dangerous, that he was encountered by
3 members of the Pittsylvania County Sheriff's Department, that
4 a high speed pursuit ensued, and during that pursuit, there
5 were times that he demonstrated reckless disregard for others.

6 Ultimately, when the pursuit came to an end, that he
7 exited his vehicle while the vehicle was still moving, and
8 that as he exited that vehicle, members of the Pittsylvania
9 County Sheriff's Department pursued him on foot. Initially, I
10 believe it was Scott Wyatt.

11 And within a few feet, I would imagine, of the foot
12 pursuit, that it was observed that his hand was moving towards
13 his right side, that he was tackled to the ground, and that,
14 ultimately, there were five members of the department that had
15 to work to try to get him under control and into custody.

16 Q Now, in analyzing the situation, what standard do you
17 apply?

18 A When I was looking at everything, the standard that I
19 utilized as far as the reasonableness of their actions comes
20 down to the *Graham v. Connor* case where there are essentially
21 three questions that are asked that they try to fulfill.

22 MR. BEATON: Objection, Your Honor. I object to the
23 expert witness speaking to the jury about what the law means
24 under *Graham v. Connor*.

25 THE COURT: I'm sorry?

1 MR. BEATON: I object to the expert witness
2 testifying to the jury about what the Supreme Court's decision
3 in *Graham v. Connor* means.

4 THE COURT: Sustained.

5 MR. GUYNN: Your Honor, may he testify with regard to
6 the criteria that are set forth?

7 THE COURT: Well, he can testify to the criteria that
8 is generally used and accepted in the community.

9 MR. GUYNN: Yes.

10 BY MR. GUYNN:

11 Q Don't worry about being a lawyer, but tell the jury about
12 what the criteria are to determine whether the force is
13 reasonable.

14 THE COURT: The criteria accepted by -- within the
15 law enforcement community.

16 BY MR. GUYNN:

17 Q Right. What the Judge says.

18 A The criteria that is accepted within the law enforcement
19 community involves the severity of the crime, whether that
20 person has placed either the officer or others in imminent
21 jeopardy of serious physical injury or death, and also whether
22 the person was actively resisting.

23 Q You said earlier that you saw that he was an armed felon.
24 Is that a severe crime under the criteria?

25 A Yes.

Wershbaile - Direct

1 Q And is giving the impression that you have a gun, placing
2 the officers or -- does that meet the second criteria?

3 A That would give you a clue as far as what his body
4 movement was doing, that there is, based off of training and
5 experience that officers receive not only in an academy
6 setting but through practical experience, that quick movements
7 to the waistband, it's a typical area that someone does carry
8 a weapon. And when someone is running, if they're holding
9 their hand in place, it's usually trying to hold something or
10 retrieve something from that area.

11 Q Is there any question that he was trying to escape or
12 flee from the police?

13 A There is no question that he was trying to flee from
14 them.

15 Q Now, did you undertake an analysis of each of the
16 officers' actions based upon those generally understood
17 criteria?

18 A I did.

19 Q And where do you want to start?

20 A Well, the first interaction that I looked at -- and this
21 is after reading all the statements, then I looked at the
22 video. I wanted to try to get a better understanding of what
23 they were -- not just what I was going to see on the video,
24 but maybe what they were thinking, hoping that was going to
25 come out through their statements.

Wershbale - Direct

1 So when I did finally watch the video, I essentially
2 broke it down into three interactions. The first interaction
3 would have been with Investigator Wyatt and I believe
4 Investigator Shelton.

5 In watching that video, I saw that they were already down
6 on the ground. So it kind of takes place after he has already
7 bailed. You're not sure whether he had that hand under there
8 or not; it is just going off their statements as far as what
9 was going on. That they were working to try to get to a
10 controlled position; they were not being successful. Their
11 statements included that he was still flailing, so showing
12 they weren't able to get control of that hand that was going
13 underneath, as well as him in totality.

14 The next interaction that I saw was Investigator Owens
15 and Captain Nicholson. They entered into the scene. From
16 what I can see, as well as the statements that I saw, that
17 Investigator Owens was moving into position to try to assist
18 in taking control of this person, seeing that they were having
19 difficulty getting him under the control that they wanted.

20 Captain Nicholson came up on the subject's right side,
21 which would have been the side of the hand that was being
22 reported to be underneath of him. Investigator Owens was on
23 the left-hand side. I did not see that they were able to get
24 control of him at that time.

25 The third interaction that I saw involved Investigator

Wershbaile - Direct

1 Worsham coming up. And you can see him enter. It kind of
2 looked as if he was moving up maybe with the expectation that
3 this should be under control, but then soon realized that it
4 wasn't under control, that there was movement. I saw him come
5 in on the right-hand side. It was kind of difficult to see
6 exactly his initial contact, but it was clear that he then
7 delivered several hard knee strikes to the right side of the
8 suspect. This was after Captain Nicholson had stood up.

9 And it was my assessment that Captain Nicholson realized
10 he was not in an advantageous position and that he was moving
11 in to deliver those strikes in order to take control of that
12 right arm.

13 Q Did you notice whether or not Captain Nicholson had his
14 gun drawn?

15 A I believe he had his weapon out initially and then put it
16 away when he went to go hands-on, which is a reasonable action
17 if he felt the need he was able to go hands on and get control
18 of that hand.

19 Obviously, the other investigators weren't able to get to
20 that side and able to get control of that hand. And the last
21 thing that you want to do is try to go hands-on with someone
22 where you still have a weapon in your hand. So it appeared
23 that he holstered it and then ultimately stood up.

24 Q There's been some talk about whether or not that is
25 consistent with believing that the suspect has a gun.

Wershbaile - Direct

1 A I don't see that it has any relationship to whether they
2 believe that the person has a gun. If his actions were
3 directed to try to take control of the person, you need both
4 of your hands to take control of that person.

5 If he introduced that firearm to the situation at that
6 given time, I imagine that he would have difficulty, as far as
7 being the movement of the pile, as far as having a clear shot,
8 and realized that was not a safe option.

9 Q Based on what you saw in the video, was there any reason
10 to take a shot?

11 A Based on what I saw in the video, there was no reason to
12 take a shot at all.

13 Q Now, if someone had yelled "gun" in the middle of this,
14 from a defensive tactics standpoint, what is the response to
15 that?

16 A Well, once somebody yells "gun," that means that there is
17 somebody that is present actually witnessed and saw that gun
18 in that person's possession. Obviously, that would heighten
19 everybody's actions in knowing that this is a possibility that
20 this firearm may be presented and somebody may be shot.

21 As it relates to tactics, it is really dependent upon any
22 situation as far as what is presented at that time. If you
23 already have people hands-on, the best course of action at
24 that point is to maintain hands-on.

25 A reaction is always going to be slower than a person's

Wershbaile - Direct

1 action. And with the officers reacting to that, if they were
2 to let go and move away in order to draw their weapons to
3 address a firearm, it does not stop the subject from his
4 continued actions.

5 So as they're extracting themselves, he would still have
6 that ability to utilize that weapon and put them at a
7 disadvantage. So in that situation, it would really just make
8 people aware, if someone was to yell "gun," that there was a
9 firearm in play and that they needed to be cognizant of it.

10 Q Earlier you used the term "under control." In the
11 circumstances as you understand them based on the video and
12 the statements, what would placing the suspect under control
13 mean?

14 A Well, to put -- to put someone under control, it means
15 that you have the power of influence to direct that person's
16 actions to exactly what you want them to do.

17 From what I saw in this video and from the statements, it
18 appeared that they did not have control of this person. How
19 do we obtain control? Dependent upon situations, it's always
20 going to be anchored with good verbal direction.

21 From what I understand, there was verbal direction being
22 given, as far as giving -- asking for that person to put their
23 hand out, Mr. Wyatt to put his hand out. In obtaining
24 control, it may, in addition, require utilizing physical
25 techniques that may include joint manipulation, pain

1 compliance, utilization of other tools that a person may have
2 in their possession.

3 Q Would he have been under control with his right arm under
4 him?

5 A Simply having the right hand under him, he was not under
6 control in my opinion, simply because their intent was to have
7 his right hand out so they could have actual hands on it so
8 they can manipulate it into a prone handcuffing position,
9 meaning laying on the ground handcuffing position. So he was
10 not under control.

11 Q Is there anything about the fact that they thought he had
12 a gun in his waistband that is inconsistent with pulling his
13 hand out? Does that make -- never mind, I will ask it this
14 way.

15 Some of the questioning has indicated that pulling
16 somebody's hand out that has a gun in it would not be a good
17 move by the police officers. Is there a defensive tactic that
18 is used to do that?

19 A I would say based on the facts of this matter that, with
20 the person laying prone on their stomach, with a hand
21 underneath them, there is an indication they believed he had a
22 gun but they had not seen the gun yet.

23 With that being said, they would -- it would not be a
24 pretty endeavor to try to get that hand out. In order to get
25 it out, as far as an appropriate defensive tactics technique,

Wershbale - Direct

1 would be to try to cause some kind of motor dysfunction to
2 that arm, either through hard strikes, to a point where you
3 can control that arm, loosen it up a little bit, but then you
4 would still have to be very careful as far as bringing that
5 out.

6 If you don't mind me pantomiming, as far as the hand
7 coming out, you would need to control that arm in a way that
8 it does not have free reign of motion. You would need to
9 control it at least at the elbow area, eventually making its
10 way out, sliding your hand down in order to trap the wrist
11 area. Only at that point, now that there was a gun in his
12 hand, you would have it trapped.

13 You would still have to be aware of the muzzle, as far as
14 where it could potentially fire. Once again, they would be
15 giving good verbal direction. And then ultimately moving that
16 weapon. And there's techniques that are used where,
17 basically, you oppose the trigger finger in order to bring the
18 barrel back and around in order to strip a handgun from
19 somebody's hand.

20 Q From a defensive tactics standpoint and officer safety
21 standpoint, if there were a gun under him, was it safe for it
22 to stay under him?

23 A No, it was not safe to be under him, especially without
24 an arm being in control. He would still be able to access
25 that. And just because that gun is not necessarily out and

Wershbaile - Direct

1 pointed, it could still be fired from a waistband position.

2 Now, of course, that might injure the person that is
3 carrying the weapon, but it also has the potential to injure
4 anyone else around.

5 Q Well, we don't want the suspect shooting themselves
6 either, do we?

7 A I don't think we want anybody to get hurt, but it
8 happens. I've seen that happen.

9 Q All right. So let's begin with Scott Wyatt. Scott
10 testified that when he tackled the suspect and -- that is,
11 Michael Wyatt, he wouldn't give him his hands, and he started
12 striking him about the head.

13 Do you have an opinion as to whether or not the use of
14 force by Scott Wyatt in this case was reasonable?

15 A I felt that his response to Mr. Wyatt's, Mr. Michael
16 Wyatt's, resistance was appropriate.

17 From what I understand, as far as how everything
18 transpired, it was a very quick event. It went from the
19 vehicle pursuit to what would be considered just the foot
20 pursuit, seeing Mr. Michael Wyatt coming out of the vehicle,
21 Investigator Wyatt coming out of his vehicle, the quick
22 recognition based off of his training and experience that a
23 hand movement towards the waistband may indicate that there is
24 a weapon there, while the other arm is still running.

25 In the short amount of time, he would make that quick

Wershbale - Direct

1 assessment that I need to -- I can't just let this person go
2 based on lack of cover. Once again, going back to what I
3 mentioned as far as reaction being slower than an action, if
4 he was to react to extract, it may still give that person
5 either time to get away into an occupied area or spin and
6 return fire if there was a weapon present.

7 So I believe it is reasonable to go hands on with that
8 person, tackle him, delivering some kind of distraction area
9 or stunning strikes to that person in an attempt to get
10 control of them, the distraction techniques along that side of
11 the body that Investigator Wyatt was on, hopefully taking
12 Mr. Michael Wyatt's mind off of what he may have been trying
13 to retrieve with his right hand.

14 Q There is both in policies as well as there has been in
15 testimony an indication that you're not supposed to strike
16 somebody in the head. Is that an ironclad rule?

17 A It's not an ironclad rule. As far as instruction goes
18 through DCJS, when it talks about target areas, they primarily
19 talk about target areas that should be accessed with a baton,
20 usually, in these days, a metal piece of pipe.

21 If you were to hit certain areas -- and the head would be
22 considered a lethal area. If you were to hit somebody, as you
23 can imagine, with a piece of metal pipe, you're going to cause
24 serious physical injury or possible death.

25 In doing so, it also indicates that, as those targets go,

Wershbaile - Direct

1 it's a good rule of thumb as far as when teaching a new
2 officer you should avoid striking the head when possible
3 because there is the potential.

4 However, as far as how law enforcement typically works,
5 we're very structured as far as rules. There's shoulds and
6 there's shalls. A shall would be you never do this unless you
7 have certain criteria. A should would be you shouldn't
8 depending on the facts and circumstances of that situation. A
9 strike using a hand would be reasonable based off the
10 circumstances I saw in this situation.

11 Q And the circumstances are basically we're in a street
12 fight here, aren't we?

13 A Well, it's a fight with a person that is a known felon,
14 that is wanted, that you believe to be in possession of a
15 firearm.

16 Q Do you need a drink of water or whatever?

17 A No, I'm good. Thank you.

18 Q All right. So as far as Investigator Wyatt is concerned,
19 if he struck Michael Wyatt in the head under these
20 circumstances, in your opinion that was reasonable?

21 A I would say that's reasonable.

22 Q Now, let me go forward then to Johnny Owens, Investigator
23 Owens. You described that he went up -- describe what he did.

24 A From my recollection, Investigator Owens was the third,
25 third officer interacting with Mr. Michael Wyatt. It appeared

Wershbaile - Direct

1 that he was moving along Mr. Wyatt's left side of his body.

2 It looked like his initial thoughts were to take control. I

3 don't know if he recognized the fact that there was a hand

4 under -- his right hand under Mr. Wyatt or not.

5 He knew that they had to take control of arms in order to

6 ultimately get this person into custody, into control. What I

7 saw, he delivered several strikes along the upper back of

8 Mr. Wyatt, from what I can recall from the video. Ultimately,

9 he was able to get the left arm out and he was able to put

10 that in a wristlock.

11 Q And did he use distraction strikes?

12 A That's what I assessed as far as the strikes that he was

13 delivering, trying to take Mr. Wyatt, Mr. Michael Wyatt's mind

14 off of his action of keeping himself balled up.

15 Q Do you have any way to gauge, based on the video, the

16 force of those strikes?

17 A I do not.

18 Q Were they rapid?

19 A To my recollection, they were one after the other.

20 Q And is that the way you punch people the hardest?

21 A I think that would still be subjective to say if it's the

22 hardest. Typically, a quick succession is a jab. Usually to

23 generate a lot of power, you try to utilize your entire body,

24 which means, as you can imagine, bringing the arm back and

25 getting rotation into it to generate more power into a strike.

1 Typically, a rapid succession strike is more of a jab, which
2 is not as powerful as a full punch.

3 Q Now, so the force used by Investigator Owens was the
4 wristlock and the jab distraction blows you just mentioned?

5 A That's what I saw, yes.

6 Q And in your opinion, were those reasonable under the
7 circumstances?

8 A Once again, under these circumstances, I believe that was
9 reasonable.

10 Q Did they work?

11 A They were not effective. Thus --

12 Q As far as the right arm is concerned.

13 A As far as the right arm. It appeared that since he was
14 able to get control of that left arm, that they were at least
15 effective on that side. But it did still not put Mr. Mike
16 Wyatt in control in this situation, being that there was still
17 a threat of the right hand underneath his body.

18 Q Next Robert Worsham comes in. And you mentioned you saw
19 him in the video and he uses knee strikes.

20 A Yes.

21 Q Were knee strikes reasonable under the circumstances?

22 A Under the circumstances in this, I did see it as
23 reasonable. My recollection from the video, as well as his
24 statements, was as Investigator Worsham was coming up to the
25 scene, he realized this person was still not under control.

Wershbale - Direct

1 He moved in to deliver stunning distraction techniques to that
2 shoulder area. I recall he stated that he threw a punch but
3 missed. He was fearful of further injury to his hand.

4 I was -- I do not recall whether it was his weapon-side
5 hand or not, but it was one of his hands. And the reason
6 that's important was if you damage your weapon-side hand, the
7 hand that you typically might fire your weapon with, that if
8 it turned into a situation where he had to draw it, he was
9 going to be at a disadvantage.

10 After that recollection, he made the decision to move
11 towards the knee strikes, once again delivering them along the
12 side of the body, the right side of the body, in the area that
13 appeared in the video to be in that upper shoulder area.

14 Based on my training and experience, that area is a
15 suitable target. The actual name of the technique -- or the
16 area that you're targeting is referred to as a brachial plexus
17 tie-in, where essentially there's a lot of nerves that come
18 into it. Training in that shows that if you are able to
19 deliver a hard strike to that specific area, a typical result
20 would be motor dysfunction, meaning the arm is not able to
21 work as well. It creates a lot of pain, and it also gives the
22 person that is utilizing that technique the opportunity to use
23 that lag time created during that stunning to start moving
24 that arm into a controlled position.

25 And once again, I think at this point it will become

Wershbale - Direct

1 dependent upon whether they see a weapon or not as far as how
2 they go. They will still be cautious, as far as extracting
3 that arm out, to see if there is a weapon in that person's
4 hands. If not, they would proceed through just a routine
5 prone handcuffing position, where they would ultimately bring
6 that arm out to the side, fold it over, bend it around in
7 order to place cuffs on the person.

8 Q In your training, do you teach knee strikes?

9 A We do teach knee strikes. Where we -- what we
10 specifically try to do is we try to teach targets, because
11 depending on the dynamics of a situation, a hand strike might
12 not be applicable, a knee strike might not be applicable. But
13 if you know this is a target to strike and this is the desired
14 effect, then you can do it.

15 But to answer your question, yeah, we have taught knee
16 strikes.

17 Q And are they limited to times when somebody is standing
18 or laying down, or can they be used -- how do you determine if
19 it is appropriate?

20 A When we do a lot of the instruction that we provide,
21 typically the instruction that someone would receive as far as
22 a knee strike is to the common peroneal area.

23 What that area, it's along -- if you think of the area
24 between your knee and your hip, if you've ever gotten a dead
25 leg, or I think y'all know what I'm talking about there, a

Wershbaile - Direct

1 hard strike, you bang it, it hurts, it doesn't move as well as
2 it normally does.

3 And really what the intent of that technique is, is to
4 take that person off balance, as well as provide that
5 distraction as far as they may be focusing on their hands, I
6 now have pain in my leg, they think about it, the officers
7 take advantage of the hands.

8 Or, once again, as I mentioned, the disruption of
9 balance. By taking out that leg, it's going to take that
10 person off balance, being that the body has eight balance
11 points and they're able to oppose those. They take them into
12 a prone position, meaning laying down, which may reduce the
13 person's ability to run away, in order to take better control
14 of them.

15 Q And if you are prone, they are using the knee strike to
16 the brachial plexus area?

17 A As far as once you're prone, it's really dependent upon
18 the dynamics of the situation, where you are and what your
19 intent may be. If you're delivering stunning distraction
20 techniques, it's going to be dependent on how close you are to
21 a certain area and whether that's one of those targets that
22 you're trying to get as far as trying to achieve motor
23 dysfunction.

24 Q Did you make a determination -- or reach an opinion, I'm
25 sorry, about whether or not Robert Worsham's knee strikes were

Wershbaile - Direct

1 reasonable force under the circumstances?

2 A Under these circumstances, I found that his knee strikes
3 were reasonable and appropriate. I think when I looked at
4 everything, when everything was said and done, though there
5 was four officers that were trying to control Mr. Wyatt, they
6 weren't successful. They got one side, but he wasn't
7 completely under control.

8 It wasn't until that fifth person showed up, delivered
9 those hard strikes to the area of the arm in order to extract
10 that arm and get him into a cuffing position.

11 Q So they were effective?

12 A They were effective.

13 Q Did you take note on the video of any strikes or any
14 force used after he was handcuffed?

15 A I saw nothing after he was handcuffed.

16 Q What is a felony car stop?

17 A A felony car stop, we try to refer to it as a high-risk
18 car stop. And with that, it's usually a more orchestrated
19 traffic stop. If you think of a low-risk traffic stop, some
20 people call it routine. We try to say there's nothing routine
21 when you're stopping a car. Where in a low-risk stop, an
22 officer stops a car, they approach the vehicle, they interact
23 with the person inside the car.

24 When it's a high-risk traffic stop, they have concern
25 that there may be weapons inside, there may be multiple

Wershbale - Direct

1 people, they may need to wait for other resources to arrive on
2 the scene.

3 When you're conducting a high-risk traffic stop, as I
4 said, it's a little more orchestrated, you try to get multiple
5 vehicles involved. You try to position vehicles. You're
6 giving direction to the person that's inside the car usually
7 via your public address system, your PA system.

8 And when I say "orchestrated," I'm talking "Hands out the
9 window. With this hand, reach out, pull out the keys. Drop
10 the keys. Step out of the vehicle. Walk towards the sound of
11 my voice. Keep your hands up." It's very orchestrated. It
12 is keeping that person under as much control as you can, given
13 the situation.

14 Q Now, if the situation is that the person has jumped from
15 the car and is in a foot pursuit, does that work?

16 A No, it's not applicable, because, once again, you can't
17 stay -- you can't really orchestrate a high-risk traffic stop
18 if that person is running from the vehicle.

19 Q How do officers determine the level of force that is
20 necessary in a particular situation?

21 A The easy answer on that is they're responding to whatever
22 type of resistance or lack of resistance they're observing
23 from the suspect at hand. It's usually outlined, as far as a
24 continuum, that is taught early on in careers in law
25 enforcement.

Wershbale - Direct

1 And if you think about how that continuum is set up, when
2 you're dealing with a subject, that person is either going to
3 be compliant or not compliant. Well, when the person is
4 compliant, your verbal interaction with that person is usually
5 all that is needed to handle whatever type of situation it is.

6 It's when a person is not compliant that you have to
7 start looking at the different types of levels of force that
8 you may utilize.

9 Those levels of force include everything from not just a
10 good verbal direction, it may include hands-on techniques,
11 sometimes referred as soft hands, where it's just basic
12 control holds; to hard hands, which might include strikes.
13 But it's not limited to just hands. It could be knees, feet.

14 It may involve intermediate weapons, which might include
15 capsicum spray, tasers, batons, other less -- and they're
16 usually referred to as less lethal weapons, less than lethal,
17 because the design is not designed to lead to death or
18 permanent physical injury, all the way up to, I guess, a
19 deadly force response.

20 So it's really based off of what types of resistance
21 you're seeing.

22 In looking at the resistance that a person can have, I
23 mentioned the person is compliant, that's ideal.

24 You have passive resistance. That is a person that is
25 just using dead weight. They're not listening to you, but

1 they're not doing anything that is going to hurt you.

2 If anyone ever had a child that was throwing a temper
3 tantrum and they're just laying on the ground, they weren't
4 trying to hurt you, but they weren't making it easy for you as
5 far as trying to take control of them. That would be passive
6 resistance.

7 Moving up, you have active resistance. That is when that
8 person is actually making movements in a way to be
9 counterproductive to what the officer's intent, as far as
10 taking control of the person, is.

11 What that might include, pulling your arm in, bracing
12 your arms in a way so they can't work certain maneuvers.

13 Once you go past that active, it's more aggressive,
14 sometimes referred to as assaultive resistance. That's when
15 they're actually making movements that could hurt you, whether
16 it's flailing with their feet, kicking wildly, throwing
17 punches, spitting, biting, everything included.

18 And then once you move through that, you move to that
19 deadly or lethal resistance, where they are doing actions that
20 would be foreseeable that could lead to death or permanent
21 physical injury to either the officer or someone else as far
22 as their actions.

23 So they take in all this information and that's how they
24 ultimately respond.

25 Q In this case, would -- you mentioned tasers and OC spray.

1 OC being the pepper spray?

2 A Yes.

3 Q Would they have been more appropriate?

4 A It's my understanding that they weren't even an option in
5 this matter. From what I understand, all the investigators
6 were plain clothes, so they carry the bare essentials, usually
7 a firearm and handcuffs. They don't have all the other tools.
8 They don't have the belt to carry all their equipment.

9 Would it have been appropriate? I don't think so in this
10 situation. Being that they were as close as they were, I
11 think if they were to use pepper spray, you're risking
12 contaminating everybody else that is there.

13 It's not like a laser, as far as shooting that stream
14 out. Once it hits, it splatters, and it can get anywhere and
15 everywhere and it usually does, which impacts the officers'
16 safety as well.

17 Even a baton, I would find that a baton would have been
18 difficult to utilize in this situation being it was close
19 quarters as it was. And by swinging that baton, you're
20 running the risk of hitting those other people that are right
21 there, and maybe not hitting that targeted area that you're
22 hoping to get that desired effect from.

23 Q Thank you.

24 CROSS-EXAMINATION

25 BY MR. BEATON:

1 Q Good morning, Lieutenant.

2 A Good morning, sir.

3 Q When you perform your job as an instructor, does the term
4 "trained techniques" mean something to you?

5 A I'm sorry?

6 Q When I say "trained techniques," is that a term that
7 means something to you as an instructor?

8 A Yes.

9 Q It means the sort of techniques that you want to teach,
10 train, retrain your officers in to safely and effectively
11 control a suspect in a way that's unlikely to cause lasting or
12 serious physical injury, right?

13 A Trained techniques sometimes provide that result. It all
14 depends on what the technique is. Some techniques are
15 designed, as I mentioned early on, that some of the tactics
16 that are taught could lead to death. So it all depends on
17 what you're looking to try to teach, what specific techniques.

18 Q So, for example, a wristlock is an example of a technique
19 that can effectively gain control of a suspect, very unlikely
20 to cause lasting or serious physical injury, correct?

21 A That is correct.

22 Q And you teach that at the academy in your instruction
23 courses, right?

24 A Yes.

25 Q And the knee strike to the common peroneal nerve is

1 another common tactic that you teach, correct?

2 A Correct.

3 Q And you teach different sort of distraction strikes,
4 right? A glance -- a backhand to the face?

5 A There are several stunning distraction techniques that
6 are taught, yes.

7 Q Openhanded towards the face?

8 A They can be openhanded or backhanded, yes.

9 Q Right. Downward pressure on the nose?

10 A Yes.

11 Q Not closed fist, open?

12 A Ideally, you would --

13 Q Talking about the head area.

14 A Ideally, you would like it to be open, an open hand. And
15 primarily the reason we try to avoid using a fist is,
16 unfortunately, in a critical situation sometimes that officer
17 might wrap their thumb. And if anyone has ever punched with a
18 thumb wrap, you're looking at potential injury occurring to
19 yourself.

20 And so we try to teach them that when you're working that
21 area, specifically the head, being the skull is one of the
22 hardest bones in the body, that you try to avoid using closed
23 fist, yes.

24 Q Knee in someone's back to hold them down while you're
25 handcuffing, that would be a trained control technique too,

1 right? Do you teach officers to use their knee to hold
2 someone down safely during the handcuff?

3 A Yeah. There is a positioning that we utilize where it
4 causes your body to go across them at approximately about a
5 45-degree angle, yes.

6 Q So that's a yes, you do teach that technique?

7 A We do teach it as a technique, yes.

8 Q When you teach handcuffing, you want the subject on the
9 ground, right, or on a flat surface, to take away 180 degrees
10 of their movement, right? That's the safest way to handcuff
11 them?

12 A We teach both standing and prone handcuffing.

13 Q Right. Prone is better, right, because then they can't
14 do anything in front of themselves?

15 A Ideally, yes.

16 Q You do teach that, right?

17 A Yes, we do teach that, yes.

18 Q And it's easier to control someone in a trained
19 handcuffing technique, the way you teach it, knee, prone,
20 bringing them around in a trained way, correct?

21 A Yes.

22 Q There's no difference in the way you teach these
23 techniques in Henrico County, Virginia, versus Pittsylvania
24 County, versus North Carolina or anywhere else that meets
25 normal police practices instruction, is there?

1 A There aren't any major differences. There are minor
2 differences --

3 Q No differences --

4 A -- as far as manipulating --

5 Q I'm sorry.

6 A Well, there's minor differences in the placement of the
7 hand as far as once that person is in that prone position.
8 But for the most part, it's very similar.

9 Q No differences that are relevant to this case, are there?

10 A No.

11 Q Okay. Thank you.

12 Now I would like to go to the basis for your opinions in
13 this case.

14 A Okay.

15 Q Do you remember when you disclosed your opinion earlier
16 in this litigation and then I deposed you, right?

17 A Yes.

18 Q Your opinions today are no different than they were at
19 that point, when you swore and gave your testimony, are they?

20 A My opinions are the same.

21 Q There's no other materials you're relying on today beyond
22 what you relied on then, is there?

23 A No materials.

24 Q Okay. I didn't think so. I just wanted to make that
25 clear.

Wershbaile - Cross

1 Are you aware today that Investigator Worsham kneed
2 Michael Wyatt five times in the head area?

3 A It's my understanding that he kneed him several times,
4 and I believe five is a correct number. But from my
5 understanding, it was in that upper shoulder area.

6 Q So if he kneed him in the head, that would make your
7 opinion different, right?

8 A If he kneed him in the head intentionally, yes.

9 Q What if he kneed him in the head recklessly, would your
10 opinion be different then?

11 A I would say no, being that he was targeting that area. I
12 would say -- and I wouldn't use the word recklessly.

13 Q That is my question. If he did so recklessly, would that
14 change your opinion?

15 A If it was recklessly, yes.

16 Q Okay. Because when I -- when you gave your initial
17 opinion, when you initially reached your opinion in this case,
18 you didn't know that there was even a chance that Robert
19 Worsham had kneed Michael Wyatt in the head or neck area, did
20 you?

21 A That -- well, I don't recall if I knew that at that time,
22 I do not.

23 Q You don't know one way or the other?

24 A From what I recall, it was his intentions --

25 Q I'm not asking intention. I'm asking whether he kneed

1 him in the head area.

2 A I could not tell --

3 Q When you reached your opinion in this case, which has not
4 changed, you did not know that he threw a knee around
5 Mr. Wyatt's head, did you?

6 A I knew that he delivered strikes in that area, not
7 intentionally, though, from my opinion. And I may need to
8 have recollection if you want to provide that. I think my
9 statement may have been that it would be understandable if it
10 went off target.

11 Q Well, do you recall your statement, it may have been
12 understandable if it went off target?

13 A Yes, based off how that -- obviously you have that, so if
14 you can provide it, that would be great.

15 Q I'm happy to provide it for you. This is from your
16 deposition. You testified under oath then --

17 A Yes.

18 Q -- just like you did today, right?

19 A Yes, sir.

20 Q And you told the truth then, just like you're doing
21 today?

22 A Yes.

23 Q "Question: Are you aware that Worsham hit Michael Wyatt
24 in the head with his knee strikes?"

25 "Answer: No."

1 "Question:" --

2 Well, I will stop there.

3 So that did not factor into your opinion when you
4 initially reached it, because you didn't know there was
5 even -- you didn't account for the fact that he got kneed in
6 the head?

7 A I was not aware that he was struck in the head, but I
8 believe in my statement I did make mention that even if he
9 did, with his intent to strike that shoulder, that it would be
10 understandable. I believe that is in my statement as well.

11 Q What statement are you talking about? Your report or
12 your deposition testimony?

13 A My report.

14 Q If I told you that your report doesn't mention the word
15 "knee," would you disagree with me?

16 A I would have to look at that report. I have no reason
17 not to believe you, if you don't see the word "knee."

18 Q Or "head" at all?

19 THE COURT: You can let him see it, if you would
20 like.

21 MR. BEATON: We'll move on.

22 BY MR. BEATON:

23 Q For a police practices instructor, the distinction
24 between throwing a knee to the side or the shoulder or the
25 head is critical, isn't it?

1 A It is critical when you're -- as far as picking your
2 target, yes.

3 Q Right. Because you would never ever teach an officer to
4 throw a knee strike to the head of someone who's laying face
5 down on the pavement, would you?

6 A It would be dependent upon the situation. If they can
7 articulate their use of deadly force.

8 Q Not the articulation. Have you ever taught anyone to
9 knee anyone in the head when they're on the pavement?

10 A Not specifically, but I do teach targeted areas.

11 Q You teach targeted areas. My question is, have you ever
12 taught anyone it is okay to knee someone else in the head
13 area? No.

14 A I think my answer on that, sir, was I teach targeted
15 areas, and your articulation to hit a specific area will be
16 dependent upon that situation. Though I might not physically
17 show them in a class, "This is how you deliver a knee strike
18 to the head," I mentioned before that there are targeted areas
19 that you try to hit, and it comes down to articulation as far
20 as why you chose to make that strike.

21 Q From your deposition transcript, page 84, line 6 to 8:

22 "Question: Have you ever taught a knee strike to the
23 head when the suspect is prone on the ground?"

24 "Answer: I have not. No."

25 Earlier when Mr. Guynn was asking you questions, you

1 mentioned a couple of times that you relied on statements of
2 the officers. What statements are you talking about?

3 A When I was referring to statements, it included not only
4 their reports that were generated within Pittsylvania County
5 Sheriff's Department, but also statements that they made as
6 far as their depositions. Or I'm not quite sure what the
7 terminology is as far as their -- I'm at a loss as far as
8 knowing what the legal term is on what that specific statement
9 is. I'm sure there is a difference that will be pointed out.

10 Q Is your testimony today that you reviewed their
11 deposition testimony, their sworn testimony?

12 A I did not review their sworn deposition, I don't believe
13 so.

14 Q I think that's right, you didn't. You didn't review
15 Mr. Wyatt's deposition transcript in this case?

16 A I did, as well as I guess his initial complaint.

17 Q You did or did not review Mr. Wyatt's deposition?

18 A I did, I believe, yes.

19 Q Page 71, line 23. "Question: Did you review any
20 deposition transcripts in this case?"

21 "No."

22 You didn't talk to Mr. Wyatt to hear his side of the
23 story, did you?

24 A No, I did not.

25 Q Before you reached your opinion in this case, you hadn't

1 talked to any of the defendants, had you?

2 A That's correct, I had not.

3 Q All you had were their own statements that they wrote
4 themselves after the incident, correct?

5 A That is correct.

6 Q There came a time, didn't there, when you said, "I want
7 some more information about what was happening on the scene."
8 Do you remember that?

9 A Yes.

10 Q And you picked up the phone and you called Mr. Guynn's
11 paralegal at his law firm. Do you remember that?

12 A Yes.

13 Q And she described the incident for you, right?

14 A She did.

15 Q And this paralegal, Ms. Reed, was not at the site of the
16 accident, was she?

17 A No. She paraphrased most of it, yes.

18 Q She's not trained in police tactics, is she?

19 A No, not that I'm aware of.

20 Q Do you know whether she had reviewed the depositions in
21 this case?

22 A I am not.

23 Q So when you reached your opinion in this case, you talked
24 to the paralegal, you had watched the video, you had read the
25 officers' statements, right?

1 A That's correct.

2 Q You had not ever heard any of the defendants say anything
3 about a distraction blow, had you?

4 A No.

5 Q Or a stunning blow? You never heard that term either
6 from the defendants, when you reached your opinion?

7 A Not from the defendants. But those are terms that are
8 utilized in the instruction of defensive tactics.

9 Q No question about that. The defendants had never
10 described what they did to Mr. Wyatt as a distraction blow,
11 had they?

12 A Not that I recall.

13 Q That was the term that you used?

14 A That is a term that I used based off what I saw, yes.

15 Q And when you reached your opinion, were you aware whether
16 the defendants had any training of any sort in distraction or
17 stunning blows?

18 A The only training that I can assume that they have is,
19 being that they are certified law enforcement officers, that
20 they at a minimum received their training when they first
21 applied, went through whatever academy that they did, being
22 it's a DCJS mandate, in order to show that they successfully
23 passed that training in order to move on and ultimately obtain
24 their certification.

25 Q That's your assumption, right? You don't know that,

1 that's your assumption?

2 A Yes, sir.

3 Q And you don't know whether whatever training they may
4 have gotten in distraction blows or stunning blows involved
5 punches to the head, knees to the head area, do you?

6 A Their specific --

7 Q You don't know the training?

8 A Their specific training, no, I can't say specifically
9 what they were trained in.

10 Q Even though you agree with me that an officer's training
11 and experience is relevant to the force they use at a given
12 point in time, right?

13 A That's correct.

14 Q At the time you reached your opinion in this case, you
15 thought Mr. Wyatt's injuries came from the car door, didn't
16 you?

17 A I believe that, if I recall our deposition together, when
18 you asked where I thought that may have come from, I thought
19 that there were several opportunities for those injuries to
20 occur, one of them being the car door.

21 It was described to me -- I'm sorry, I read this in his
22 statement -- in one of the statements, that as the person was
23 jumping or exiting the vehicle, Mr. Wyatt was exiting the
24 vehicle, that it appeared that he was standing on the running
25 board and that the door came back and hit him in the right

1 side of the head.

2 I also said that I would understand that those injuries
3 may -- could have occurred during that initial takedown, when
4 Investigator Wyatt first had took him down to the ground; as
5 well as anything else that may have occurred during that
6 scuffle, that it would -- that would be a reasonable
7 assumption that those were -- where those injuries most likely
8 appeared from.

9 Q Here's the two things that you mentioned, right, the car
10 door and the tackle. And you didn't say anything about the
11 punches or the knees, did you?

12 A Not that I recall specifically if I used "knee" or
13 "punches," no.

14 Q Is it still your opinion today that his injuries were
15 caused by the car door, or has your opinion changed in that
16 respect?

17 A Well, I don't think I ever said my opinion strictly was
18 his injuries were caused by the car door. I said that the car
19 door may have been a contributing factor.

20 Q And that's your opinion sitting here today?

21 A I would say it's no different than I gave in my original
22 deposition, that it could have been as a result of the door or
23 from his landing on the ground.

24 Q Right.

25 A Or a combination of both.

1 Q Either the tackle or the car door, those are the two
2 options?

3 A And it could be both, yes.

4 Q Nothing else could have caused those injuries?

5 A Only what may -- that could have been a result of the
6 scuffling and moving around, yes.

7 Q It could have been as a result of the punches, right?

8 A It could have been.

9 Q Or the knee strikes?

10 A (Shrugs.)

11 Q But you didn't say that when you reached your opinion in
12 this case?

13 A That is correct.

14 Q You said it is the car door or the tackle?

15 A Yes, that is correct.

16 Q You also agree with me that an officer's use of force
17 experience is relevant is to their assessment of the
18 appropriate amount of force to use in a situation, don't you?

19 A I do.

20 Q You do?

21 A Yes.

22 Q But you did not review any officer's use of force history
23 in this case, did you?

24 A I don't recall having anything on that that I could have
25 reviewed. There was some training records, but it was very --

1 not very detailed.

2 Q Right. I believe you may have -- well, let me ask the
3 question. Were there some disciplinary letters amongst the
4 materials provided to you?

5 A I vaguely recall that there was a -- there may have been
6 some disciplinary action. I don't recall who or specifically
7 which.

8 Q Because you did not account for any use of force history
9 or discipline in your analysis, did you?

10 A I did not.

11 Q Even though you agree that use of force experience may be
12 relevant to the appropriateness of the force used by an
13 officer?

14 A Yes.

15 Q For instance, if an officer had been specifically
16 retrained in one technique, you would expect him to use that
17 technique properly going forward, wouldn't you?

18 A I would.

19 Q When you reached your opinion in this case, you were not
20 aware that two of the defendants had special remedial use of
21 force training, were you?

22 A Not that I recall.

23 Q And you weren't aware that that special remedial training
24 involved knee strikes, were you?

25 A I was not aware of that.

1 Q You weren't aware that Investigator Worsham had mockingly
2 cited his special knee force training in justifying use of
3 force?

4 MR. GUYNN: Objection.

5 BY MR. BEATON:

6 Q Were you?

7 MR. GUYNN: Objection. That's not what the Court
8 allowed the evidence in for, Your Honor.

9 MR. BEATON: It's in the testimony.

10 THE COURT: I don't know whether that got into
11 evidence or not.

12 MR. BEATON: I believe it came in through the
13 defendant's testimony, Your Honor.

14 THE COURT: Okay. Overruled.

15 BY MR. BEATON:

16 Q Now, let's talk for a minute, Lieutenant, about the
17 standard you used to judge the defendants' use of force in
18 this case.

19 The question you tried to answer was whether the force
20 described to you in the defendants' reports was reasonable to
21 use against Michael Wyatt under the circumstances in the
22 parking lot that day, right?

23 A Yes.

24 Q And in that situation, the amount of force that was
25 reasonable was the amount of force that was the minimum

1 required to safely arrest him, wasn't it?

2 A In looking at the Pittsylvania County policy on that, one
3 part states "minimum," and it also states further on in their
4 policy "reasonable."

5 Q And you would agree with me, wouldn't you, that in this
6 case there is no difference between what is minimal and what
7 is reasonable?

8 A I agree that in this situation that they utilized the
9 minimum, which was reasonable.

10 Q Thank you. When you reached your opinion in this case,
11 you relied on three different factors, right, to determine
12 whether that force was reasonable?

13 A Yes.

14 Q Those three factors, correct me if I'm wrong: prior
15 knowledge and interactions with the suspect, proximity to a
16 weapon, and the ratio of defendants to plaintiff; is that
17 right?

18 A Those are factors that were pertinent as far as -- as far
19 as my consideration went as far as it meeting the
20 reasonableness, yes. Those would be the major factors, yes.

21 Q Well, they weren't the major factors. Those were the
22 three factors you applied, right?

23 A Those were the three factors that were utilized, yes.

24 Q So let's take those one by one. Prior knowledge and
25 interactions. The officers here knew only that Mr. Wyatt was

1 suspected as armed and dangerous. That's the only knowledge
2 that you applied in reaching your conclusion, wasn't it?

3 A I also included their observations that I read from
4 Investigator Wyatt and his statement, as far as the hand going
5 to the right side. So that's an observation, and I would
6 consider that kind of prior knowledge as well.

7 In addition to them --

8 Q But one second. What was it prior to? That was his
9 observation while he was hitting Mr. Wyatt. Is that what you
10 mean by "prior to"?

11 A Well, if I can take it one step at a time.

12 Q Just answer my question first and then you can try to
13 explain. Was that what you were referring to, his
14 observations when he was hitting Mr. Wyatt? That was the
15 prior knowledge?

16 A No.

17 Q Okay. The second question was proximity to a weapon?

18 A Would you like me to answer that first part, sir, as far
19 as what I meant by "prior knowledge," or no?

20 Q Is your testimony that prior knowledge includes what they
21 observed at the moment?

22 A It would include up until their initial contact with him,
23 meaning physical, hands-on contact. So the knowledge that
24 they had as far as him being a wanted felon, that he was
25 considered armed and dangerous, and the fact that when he --

1 or the statement that was made that as he was exiting the
2 vehicle, they saw that movement of him, with his right hand
3 going towards his right side, that's knowledge that I took
4 into consideration, and that's all prior to hands-on
5 techniques.

6 Q And that's information that you got from the officers'
7 reports that they wrote up themselves?

8 A From those statements, correct.

9 Q When they were not under oath, right?

10 A When -- I'm sorry, when who wasn't?

11 Q They weren't under oath when they wrote those statements,
12 were they?

13 A Not that I'm aware of. It was their statement, though,
14 that was presented, and that's what I looked at.

15 Q Your second factor, "proximity to a weapon." Your view
16 is that the reasonableness of the force depends on whether
17 Michael Wyatt was going for a weapon under his torso, correct?

18 A Yes.

19 Q You know that Michael Wyatt was not in fact armed at the
20 time, don't you?

21 A I am not -- I was not aware of that.

22 Q You were not aware that Michael Wyatt was unarmed?

23 A The only information I had was that -- if I can go back
24 on that. It was brought to my attention that they did not
25 have a weapon on him, so he was not --

Wershbale - Cross

1 MR. BEATON: Your Honor, I think we need to clarify
2 this.

3 THE COURT: Just --

4 MR. BEATON: Can we approach, please?

5 THE COURT: It's your testimony that he did not have
6 a weapon when he was on the ground? Is that your assumption?

7 THE WITNESS: Yes, that's my assumption.

8 THE COURT: Does that take care of that?

9 BY MR. BEATON:

10 Q No officer saw him reaching out with a weapon, did they?

11 A No officer saw a weapon being drawn.

12 Q No officer saw him try to assault an officer in any way,
13 did they? No punch, no kick, no spit, nothing?

14 A Not that I can recall, no.

15 Q Third, the ratio of defendants to plaintiff. You
16 helpfully divided your analysis into three phases, so I will
17 use your three phases.

18 Phase 1: Investigator Shelton, Investigator Wyatt take
19 Michael to the ground, right?

20 A Correct.

21 Q At that point, Michael Wyatt is face down on the
22 pavement, correct?

23 A He is on -- he is laying prone with his chest to the
24 ground, yes.

25 Q I think that means face down on the pavement, right?

Wershbale - Cross

1 A I think it kind of goes into some folks' connotation. I
2 think if you're thinking his face is directly in the ground
3 versus his chest is to the ground.

4 Q How about flat on the ground? How is that? Does that
5 work?

6 A I would stay with his chest was to the ground, yes.

7 Q And at this point, the ratio of defendants to plaintiff,
8 to use your analysis, was two -- I'm sorry, not defendants,
9 officers to plaintiff was two to one, correct?

10 A That's correct.

11 Q Okay. Phase 2: Owens comes up on the right,
12 Nicholson -- on the left; Nicholson comes up on the right?

13 A Correct.

14 Q Now we're four to one?

15 A Uh-huh.

16 Q Right?

17 A That's correct.

18 Q And so under your own analysis, this is an important
19 factor to consider, that, at this moment, the ratio of
20 defendants to plaintiffs is four officers, one suspect.
21 That's important to your analysis, isn't it?

22 A It's in it, yes.

23 Q And then when Worsham arrives, it's five to one, right?

24 A That's correct.

25 Q Now, earlier you testified your understanding of

1 Worsham's approach. Being the last officer there, I believe
2 you testified earlier that he was surprised that Mr. Wyatt was
3 not under control, and so he didn't expect to have to use
4 force, but then once he realized, oh, things were different,
5 he accelerated and used more powerful force when he engaged
6 with Mr. Wyatt. Is that fair?

7 A That's a fair assessment.

8 Q Okay.

9 MR. BEATON: Jason, could you pull up the video to
10 the moment when Officer Worsham's cruiser comes around. Stop.
11 Back it up to where the white car comes in. Now just play it
12 until the knee strikes.

13 (Video is played.)

14 MR. BEATON: You can stop.

15 BY MR. BEATON:

16 Q So your testimony is Investigator Worsham approached
17 cautiously?

18 A Yeah. I didn't see -- I didn't see that as a reckless
19 approach.

20 Q I didn't say reckless. But he raced in there, didn't he?
21 He didn't hesitate?

22 A He was directing his movements.

23 Q He was running to Mr. Wyatt, wasn't he?

24 A Yes. He was moving quickly up to Mr. Wyatt, yes.

25 Q He was not hesitant, like you said earlier, was he?

1 A (No audible response.)

2 Q I'm sorry, I didn't hear your answer. He was not
3 hesitant, was he?

4 A I think it's -- I'm taking into consideration what was in
5 the statement.

6 Q You're accounting for the statement not the video?

7 A I looked at both. And I think you can make an assessment
8 on somebody very quickly, as far as what your intent is,
9 without necessarily physically seeing it.

10 Q Is it your testimony that his intent is what's relevant
11 to whether the force is reasonable?

12 A No, that's not what I said.

13 Q Then I don't understand why we're talking about intent.
14 Did his intent factor into your analysis in this case?

15 A I'm saying his assessment of the scene.

16 Q So his intent is or is not relevant to your assessment of
17 the force in this case?

18 A I'm not exactly sure where you're talking about as far as
19 which intent.

20 Q I'm just talking about one officer's intent, Officer
21 Worsham. Is that relevant to your opinion in this case?

22 A Yes, it's important. I believe his intent initially that
23 you're seeing here in the video is him coming up to the scene
24 to help take control of the situation. The assessment that
25 the person was not under control and, thus, the need to move

1 in and work that right arm.

2 MR. BEATON: Jason, could you show us the rest of the
3 knee strikes, please.

4 (Video is played.)

5 BY MR. BEATON:

6 Q You also testified earlier that Investigator Worsham
7 threw his knee strikes into Michael Wyatt's shoulder, didn't
8 you?

9 A Yes.

10 Q Can you see Mr. Wyatt's shoulder on that video?

11 A It's difficult to see in this video, yes.

12 Q You can't see his shoulder in that video, can you?

13 A That's correct.

14 Q And you cannot see Robert Worsham's knee hitting his
15 shoulder, can you?

16 A No, you can't see that.

17 Q But that's your opinion that's where his knee hit, is in
18 the shoulder?

19 A That was what my opinion was based on, yes.

20 Q Based on the video?

21 A The combination of the video as well as the statements.

22 Q I think you also testified earlier that Investigator
23 Shelton wasn't sure whether Michael Wyatt's right hand was
24 underneath him or not. Did I hear you correctly?

25 A I don't recall that.

1 Q You don't know whether Shelton thought his right arm was
2 in or out when he took him down and had him by the torso?

3 A I don't recall that.

4 Q Okay. Did you review any investigation of the use of
5 force in this incident?

6 A As far as the internal investigation of this?

7 Q Any investigation at all.

8 A No, I did not.

9 Q Was there an internal investigation in this case?

10 MR. GUYNN: Objection. It's irrelevant, Your Honor,
11 nor has anything been said of it.

12 THE COURT: Well, sustained. I mean, did he review
13 one or not? Did he know whether there was one?

14 Do you know if there was one?

15 THE WITNESS: I'm not aware that there was one nor
16 did I review one.

17 BY MR. BEATON:

18 Q Were you aware, when you reached your opinion in this
19 case, that Scott Wyatt had punched Michael Wyatt in the face?

20 A I believe in one of his statements that he did say he
21 threw a punch as he was taking him down. I would have to
22 review that.

23 Q Were you aware that he was punched in the face by Scott
24 Wyatt?

25 A Specifically in the face, no.

1 Q Is that relevant to your opinion about the reasonableness
2 of Scott Wyatt's punches, whether they hit him in the face or
3 somewhere else?

4 A No, it's not pertinent, once again, based on the
5 situation that he was responding to.

6 Q I thought you testified earlier that there were target
7 areas -- areas you were supposed to target and the areas you
8 were not supposed to target?

9 A Yes. And I think that's when I talked about the targets
10 and the shalls and the shoulds. And shalls are never, shoulds
11 with articulation. And at that point, a strike to the face is
12 acceptable.

13 Q But you didn't know he got hit in the face when you
14 reached your opinion in this case, did you?

15 A Specifically in the face -- I think his statement goes
16 along the side of the head. But it's still in that general
17 area, so it still was not pertinent to my rationale.

18 Q Your testimony is that it doesn't matter to your analysis
19 of the reasonableness of force whether a punch hit somebody in
20 the head or elsewhere on their body, that doesn't matter?

21 A Under the facts and circumstances in this matter, it did
22 not.

23 Q Of course, you didn't know that when you first reached
24 your opinion in this case, did you? You didn't know it was an
25 issue because you didn't know anyone got hit in the face?

1 A Not specifically in the face.

2 Q "Specifically"? You said "specifically." You didn't
3 know anybody got punched in the face generally or
4 specifically, did you?

5 A Well, there was -- there was a statement that said
6 "towards the head."

7 Q So the head is okay, but the face isn't?

8 A They're both acceptable under these circumstances is what
9 I'm saying.

10 Q And the circumstances we're talking about here are
11 distraction blows, right? That's your testimony?

12 A Yes.

13 Q And you teach distraction blows at Henrico County, don't
14 you?

15 A I do.

16 Q And you have never taught anyone that it's okay to punch
17 someone in the face as a distraction blow, have you?

18 A I think I described earlier that I've taught folks that
19 ideally it's open hand or back of the hand, and that we should
20 avoid using a closed fist simply because it can cause damage
21 to your hand. But ideally, you should avoid that area because
22 there is the potential.

23 Q So I'll ask my question again. Do you ever teach punches
24 to the face as distraction techniques?

25 A We teach strikes to the face.

1 Q Okay. I'm going read your deposition, page 90, line 11.

2 "Question: Do you ever teach punches to the face as a
3 distraction technique?"

4 "Answer: Not as a distraction technique."

5 Did you know how many times Mr. Wyatt was punched when
6 you reached your opinion in this case?

7 A No.

8 Q Was that relevant to your opinion whether it was once,
9 twice, or four to eight times or six times? Did that matter?

10 A Not based on the circumstances in this situation, no.

11 Q Well, you said earlier you thought it was significant
12 these were rapid strikes, that was more indicative of a
13 distraction blow, right?

14 A I said that the rapid strikes were indicative of a rapid
15 blow, which corresponds with stunning distraction techniques,
16 yes.

17 Q But when you reached your opinion in this case, you
18 didn't know anything about rapid strikes because you didn't
19 know whether he was hit more than once or twice, did you?

20 A I was aware of the strikes that I could see on the video,
21 though the targeted areas were -- weren't very visible, easily
22 seen.

23 Q You said earlier that Owens' punches hit the upper back,
24 right? Isn't that what you said this morning?

25 A I said that based off of how everyone seemed to be lying,

1 as well as the statements that were made as far as where
2 people were positioned.

3 Q You couldn't see where he hit him, could you?

4 A Specific targets, no, but general body areas I can
5 assume.

6 Q You don't know whether or not he hit him in the kidney,
7 do you?

8 A I do not know specifically if he targeted the kidney, no.

9 Q Would it be significant to your opinion whether a punch
10 landed on internal organs rather than just the fleshy part of
11 the back?

12 A As far as a punch, not necessarily. Once again, when we
13 talk about strikes, if I'm recalling correctly from our
14 deposition, the area that we were talking about that fell
15 under digestive system, cardiovascular, cardiopulmonary --

16 Q I'll ask a different question. Is it okay to punch
17 someone in an internal organ area as a distraction strike?

18 A It's not a specific target.

19 Q Is it okay to punch someone in an internal organ area as
20 a distraction strike?

21 A I think I'm answering that by saying that it is not a
22 targeted area, and it would have to be the totality of the
23 circumstances as far as that was an intended strike, not an
24 intended strike, a superficial strike that was not necessarily
25 going to cause any type of specific damage.

1 Q Those are the factors that you would account for in
2 determining whether it was reasonable?

3 A When I look at situations like it, yes.

4 Q But you don't know any of those factors, whether it was
5 intended, how many times, where he hit. If those are the
6 relevant factors and you don't know them, how can you say it's
7 reasonable?

8 A Once again, I'm looking at the totality of everything as
9 far as the actions, and, obviously, that the person was not
10 under control. And I know that, based off my training and
11 experience, the longer a situation goes on, that there's
12 potential for somebody to receive more injury. And sometimes
13 you have to deliver that hard strike in order to take
14 advantage of that person, to get them into that positioning
15 that you need them to.

16 Q But you didn't even know where he got punched, did you,
17 when you reached your opinion in this case?

18 A Not specifically, no.

19 MR. BEATON: Your Honor, I'm not quite close enough
20 to wrap up in the next couple of minutes, so I just wanted to
21 ask whether you had lunch plans or if you wanted me to keep
22 going.

23 THE COURT: I was hoping to finish this witness.
24 We've been here an hour and a half since the break. I don't
25 know whether they can hold out or not.

1 Why don't we take a lunch recess now. And I'll ask
2 the jury to be back at 1:30. And if the attorneys would just
3 stay here a minute.

4 You may step down.

5 (Jury out at 12:21 p.m.)

6 THE COURT: Okay. At lunch I wouldn't mind going --
7 everyone can leave. I just want to talk to the lawyers, to
8 get it clear on these instructions.

9 I want to try to -- Mr. Guynn, the 20/20 thing -- I
10 think one of the instructions that you thought was not there
11 is there, correct? I think he read it, told you it was there.

12 The other one, the 20/20 hindsight, I had just -- the
13 instruction we had just has "hindsight." I continue to
14 consider 20/20 hindsight as sort of a flippant or pejorative
15 term. I think hindsight is the word I intended to mean,
16 without any comment about it.

17 And what was the other instruction that you had?

18 THE LAW CLERK: The excessive force factors.

19 THE COURT: I think I understand your position. I
20 will take a look at that.

21 Let's talk a minute about that instruction that the
22 defendant had questions about -- I mean the plaintiff had
23 questions about.

24 MR. GUYNN: Your Honor, if I could?

25 THE COURT: Yes.

1 MR. GUYNN: If you could help me with the numbers
2 again. I'm sorry, which one has the hindsight?

3 THE LAW CLERK: The hindsight can be found in
4 Instruction 11, and it uses the phrase "without the benefit of
5 hindsight." Just leaves out the 20/20. And I don't remember
6 what your other one was.

7 MR. GUYNN: Well, it was that hindsight includes the
8 amount of force necessary under all the circumstances. And we
9 don't have any of that.

10 And then the other one was the second paragraph with
11 regard to the intentions. And the second paragraph says, "You
12 must decide whether the use of force was objectively
13 reasonable from the perspective of a reasonable officer facing
14 the same circumstances." I didn't see that in the rest of it.

15 THE LAW CLERK: The "You might decide whether the use
16 of force was excessive from the perspective of a reasonable
17 officer facing the same circumstances that the defendant
18 faced," that's in the second paragraph of Number 11.

19 MR. GUYNN: Oh, okay.

20 THE LAW CLERK: It's just in a place you didn't
21 anticipate it being when we were trying to put everything
22 together.

23 MR. GUYNN: I understand.

24 And then what about the split second of judgments and
25 circumstances that depends on circumstances rapidly evolving?

1 THE LAW CLERK: We might not have used that exact
2 phrase. We have a part about hindsight. I don't know if we
3 used the phrase "split second." So which number was it of
4 yours? Which page number?

5 MR. GUYNN: Page 17.

6 THE LAW CLERK: How about, Judge, do you want to move
7 on --

8 THE COURT: Excuse me?

9 THE LAW CLERK: Do you want to talk about the other
10 instructions while I look into this?

11 THE COURT: Yes, I wanted to talk about the
12 instruction regarding the prior acts. Bring the -- I don't
13 have the instructions with me.

14 THE LAW CLERK: Okay.

15 MR. BEATON: This is Number 13?

16 THE LAW CLERK: Yes. I will bring it up there.

17 MR. GUYNN: What are you referring to?

18 MR. BEATON: The draft Number 13.

19 MR. GUYNN: Yours?

20 MR. BEATON: No, the Court's draft.

21 THE COURT: Okay.

22 MR. GUYNN: I didn't get it. I don't know what
23 you're talking about, e-mail or whatever.

24 MR. BEATON: I e-mailed the Court last night, like he
25 asked us to e-mail any issues.

1 The question -- well, to bring you up to speed, the
2 question is whether, in the past uses of force instruction,
3 credibility should be in as we had proposed.

4 THE COURT: Do you have any comment?

5 MR. GUYNN: I don't think it should be, Your Honor.
6 But I also don't think the instruction should be given for the
7 reasons I think articulated consistently throughout the trial.

8 THE COURT: Well --

9 MR. BEATON: I believe the instruction is in there
10 for the benefit of the defendants, which is what the jury was
11 told at the outset of the trial.

12 THE COURT: I told the jury that they could consider
13 the evidence for the mistake or accident. And the problem is
14 Worsham has several -- made several statements about why he
15 threw the blow he did. And so, I mean, he said that he
16 intended to knee him in the shoulder, but the jury could infer
17 from here that he kneed him in the head or not in the
18 shoulder. And he has changed his testimony several times.

19 And this evidence I was admitting, what I maybe
20 propose to say now is, "may be considered only for its
21 bearing, if any, on the question of whether you believe
22 Defendant Worsham's explanation for use of force against the
23 plaintiff. You may not consider the evidence that Defendant
24 Worsham used excessive force -- you may not consider this as
25 evidence that Worsham used excessive force in this case."

1 Other than you don't want the instruction, is that any worse?

2 MR. GUYNN: I guess.

3 THE COURT: Do you have any objection to that as I
4 read it?

5 MR. BEATON: I don't think so. I just want to make
6 sure, I believe what Your Honor read was striking the second
7 sentence of the draft?

8 THE COURT: Let me read it.

9 MR. BEATON: Thank you. I'm sorry.

10 THE COURT: "Any evidence that you heard regarding
11 past uses of force by Defendant Worsham may be considered only
12 for its bearing, if any, on the question of whether you
13 believe Worsham's explanation for his use of force against the
14 plaintiff.

15 "You may not consider this as evidence that Defendant
16 Worsham used excessive force in this case. However, if you
17 find in favor of the plaintiff, against the Defendant Worsham,
18 you may consider evidence of his past uses of force in
19 determining whether to grant punitive damages."

20 MR. BEATON: Thank you, Your Honor. That is fine
21 with us. No objection.

22 MR. GUYNN: I don't think the second paragraph is
23 appropriate, Your Honor. I would object.

24 THE COURT: Well, you object to any punitive damages,
25 right?

1 MR. GUYNN: Right.

2 THE COURT: Only for that reason?

3 MR. GUYNN: For that reason. And also I don't
4 believe that his past uses of force are evidence to support
5 punitive damages.

6 THE COURT: I think it would have to be inappropriate
7 use or something, but not just use of force.

8 MR. GUYNN: Right. And we haven't had that. Nobody
9 has testified that they were substantiated.

10 MR. BEATON: That is incorrect.

11 THE COURT: Well, he was disciplined.

12 MR. GUYNN: That's not in evidence, Your Honor.

13 THE COURT: I thought he got a five-day something, a
14 suspension.

15 MR. GUYNN: No.

16 MR. BEATON: Your Honor, the defendant testified that
17 a five-day suspension was determined to be appropriate after
18 the investigation concluded the use of force was excessive and
19 part of an ongoing pattern. What didn't happen was, the
20 sheriff never implemented that determination.

21 THE COURT: I think it ought to say, "Any past use of
22 excessive force" -- I don't know. Not just "force," because
23 it all leads to force.

24 MR. BEATON: I believe, if Your Honor suggested past
25 inappropriate uses of force a moment ago, that would be fine

1 with me too.

2 THE COURT: Inappropriate use of excessive force.
3 Use of excessive force.

4 THE LAW CLERK: I think "excessive" by itself.

5 THE COURT: Yeah, I think there's evidence of
6 excessive force.

7 THE LAW CLERK: I think that's fair.

8 THE COURT: We'll draw those up, so we should be able
9 to hit the ground running when the evidence is in.

10 MR. BEATON: Thank you, Your Honor.

11 MR. GUYNN: Your Honor, will you allow -- is your
12 plan then to go ahead and instruct the jury and then we'll put
13 our objections on the record after that, after a break?

14 THE COURT: Well, any objections to the instructions
15 I would like to hear first.

16 MR. GUYNN: I think we've made them.

17 THE COURT: Any motions and anything like --

18 MR. GUYNN: I would still maintain the objection even
19 though the instruction is being modified.

20 THE COURT: Right. Okay. We'll hopefully start back
21 right at 1:30. We've got nearly an hour, anyway.

22 (Recess taken from 12:32 p.m. until 1:31 p.m.)

23 THE COURT: All right. Would the witness come back.

24 BY MR. BEATON:

25 Q Lieutenant, before lunch Mr. Guynn asked you a question

1 that described the scene in the parking lot as a street fight.

2 Do you recall that?

3 A I do.

4 Q And you agreed with him that it was a street fight?

5 A It was a brawl on the ground.

6 Q But Michael Wyatt never hit anybody, did he?

7 A I could not see that he did through the video.

8 Q Do you know, sitting here today, one way or another
9 whether Michael Wyatt hit anyone?

10 A No, I do not.

11 Q Any reason to believe he did?

12 A I have no proof to show one way or the other if he did or
13 didn't, so . . . (pause.)

14 Q Would it be significant to your expert opinion in this
15 case to know whether or not the suspect hit or tried to hit
16 the officer trying to arrest him?

17 A It would be significant as to whether he tried to strike
18 him in any way, either by hands or feet.

19 Q And if I told you that he didn't hit him, would that
20 change your opinion?

21 A If that's an honest statement, yes, sir.

22 Q It would change your opinion. Thank you.

23 Also this morning you testified that because the
24 defendants were in plain clothes, they were plain clothes
25 officers, they didn't have a taser or pepper spray available

1 to them. Do you remember that?

2 A I said typically that plain clothes officers do not --
3 I'm not aware that they had any of those items available.

4 Q So your testimony now is you don't know one way or the
5 other?

6 A Yeah. To my knowledge, they did not. And, typically,
7 plain clothes officers don't carry all the materials.

8 Q Would it change your opinion if I told you that in the
9 morning, when the officers were looking for Michael Wyatt,
10 they had Kevlar on?

11 A No.

12 Q Would it change your opinion if I told you that, in the
13 parking lot, by that time they had taken their Kevlar off?

14 A No, it would not.

15 Q You don't know one way or the other whether they started
16 that day with tasers and pepper spray that they could have
17 used against Mr. Wyatt, but by the time they got to that
18 parking lot, they had already taken it off?

19 A I'm not aware what equipment they had at the start of
20 their day or towards the end.

21 Q Would it be relevant to your opinion whether there were
22 these other less lethal weapons that they could have used to
23 arrest Michael Wyatt more safely?

24 A Under the facts and circumstances in this situation, I
25 don't believe those extra tools would have played a role. I

1 believe I testified earlier some of the shortcomings that are
2 associated with pepper spray at close distances. Even at a
3 distance, it can blow back and contaminate the officers that
4 are in pursuit. As well as a taser, it is limited as far as
5 its reach. Typically they have 21 feet to 25 feet of wire
6 that's attached to the barbs.

7 Q That's your testimony now. But you didn't know one way
8 or the other whether they had these available when you reached
9 your opinion in this case, did you?

10 A That's correct, I did not know whether they had any of
11 those items.

12 Q Also this morning you mentioned that there was a car
13 chase that preceded the arrest, correct?

14 A Yes.

15 Q And you didn't offer any expert opinion one way or the
16 other about the car chase itself, did you?

17 A I did not.

18 Q And when you assessed the reasonableness of the use of
19 force, you make that determination based on the moment when
20 the force is used, right?

21 A You make a determination as far as the use of force at
22 that moment, but you also take into consideration those
23 factors that lead up to it. That's why I mentioned, for
24 example, the aspect of the officers seeing the hand go towards
25 the right waist, believing that there was a weapon there.

1 Q The reason you talked about the car chase this morning is
2 you said, well, he was trying to flee, right? That was your
3 testimony this morning?

4 A That's correct.

5 Q When there were four officers holding him down in the
6 parking lot, he was not trying to flee, was he? He was
7 incapable of fleeing by that point, wasn't he?

8 A It's my understanding that since he was not in control --
9 or, I'm sorry. It's my understanding since the officers did
10 not have control of him initially, that there was still the
11 potential that he could still get up, he was actively moving
12 in a way he wasn't being passive in his resistance, nor
13 compliant.

14 Q When there were four officers holding him down, it is
15 your expert opinion that Michael Wyatt was able to flee?

16 A He wasn't necessarily able to flee, but he was not in
17 control. And until a person is in control, there's always the
18 potential that something could happen or the person may flee.

19 Q I think I understand your answer to be that he was
20 incapable of fleeing when there were four officers on top of
21 him, right?

22 A He was not actively fleeing, if by "fleeing" you mean
23 running away. He was on the ground. But he was not in
24 control. I'm sorry, the officers were not in control.

25 Q You told the jury this morning about training that you do

1 from time to time on the use of knee strikes; correct?

2 A Yes.

3 Q And when you train a knee strike to hit into the fleshy
4 part of the leg, the main reason that you were talking about
5 destabilization this morning is so that knee strike can take
6 the suspect to the ground, right?

7 A Yes. If you're in a standing position, basically going
8 hands-on with a person that is just standing, not running, and
9 you're standing next to them and you go hands-on to what is
10 referred to as a law enforcement grasp, to place them into a
11 control hold, that if you start to sense resistance, you could
12 deliver a knee strike to that common peroneal nerve that runs
13 along the side, in order to use as a stunning distraction or
14 take them off balance, yes.

15 Q And a knee strike does not work the same for a suspect
16 who is already on the ground, does it?

17 A Not for destabilization. But I believe I mentioned the
18 fact that we teach targeted areas, and that as long as you're
19 striking a targeted area, whether you use your hands or your
20 knee or your foot, you're trying to access that point. It
21 would still --

22 Q So a knee strike does not work the same for a suspect who
23 is already on the ground, correct?

24 A I wish I could give you that general answer. It doesn't
25 work the same as being a destabilization point. But a knee

1 strike can still work in that area to deliver pain compliance,
2 as far as a stunning distraction. It's not always the best
3 positioning you can take when down on the ground, because you
4 might not be able to generate the right power right where you
5 need it to be. Sometimes it might topple you, in a way.

6 If you can imagine yourself down on all fours, over top
7 of somebody, ideally you'd like to deliver a strike with your
8 hand. But if a hand strike isn't available to you, then a
9 knee strike could suffice if you're looking to target a
10 specific area.

11 Q So it doesn't work the same on the ground, right?

12 A Aspects of it do not work the same. It does not work the
13 same as far as being able to take a person off balance if
14 they're already standing and down on the ground. But it still
15 works, as far as being able to deliver pain or motor
16 dysfunction. And that's as long as we're still speaking about
17 that common peroneal nerve.

18 Q On page 109 of your deposition transcript, I asked you at
19 line 3: "How would it differ for a person who is already on
20 the ground?"

21 And then you give me an answer about someone who is
22 standing and somebody who is pulling away and sitting up.

23 But at line 22 you state in your answer: "The difference
24 that would be associated with this is when they are on the
25 ground, they are already in that prone position and they can

1 only roll but so much. They can still be resisting, but not
2 to the point where they may be able to use their feet to get
3 distance or close the distance with the officer."

4 A Correct. And I believe that's in line with what I'm
5 saying. That part of -- the person standing, when you deliver
6 that knee strike, you want to take them down to the ground.
7 Well, if they're already down on the ground, and as you just
8 read, they can still be resisting, though they might not be as
9 capable to quickly get to their feet to flee. So I think
10 we -- you reiterated that.

11 Q Have you seen the photographs of Mr. Wyatt's injuries in
12 this case?

13 A I have.

14 Q Do you account for those in reaching your opinion?

15 A Not really, because I don't have a medical background,
16 sir.

17 Q Are you familiar with how -- I know you are, because you
18 looked. You are familiar with how Mr. Wyatt's right eye
19 looked when he got to the hospital, aren't you?

20 A Yes. It's been a while, but I saw the pictures, yes.

21 Q Should we put them up again, or no?

22 A I don't believe it's necessary.

23 Q As far as you know, there is nothing that happened in
24 that parking lot other than Robert Worsham's knee that could
25 have caused the injury to Michael Wyatt's right eye, is there?

Wershbaile - Cross

1 A No, I believe I testified earlier that there were a lot
2 of different factors if we're -- I think we were specifically
3 talking about the right side, when he was coming off the
4 running board or the side of his car, I said one possibility
5 was the car door coming back at him.

6 And I believe that the other option was when he actually
7 made contact to the ground not knowing exactly how he landed,
8 if there were hands out, hands in --

9 Q You don't know which side of his head he landed on, do
10 you?

11 A I do not.

12 Q Whether one side was consistent with falling on the
13 ground, and the other side was consistent with blunt force
14 trauma?

15 A No, I couldn't tell you that.

16 Q Okay. Now, when you teach distraction strikes, you
17 testified earlier that the point is to take the suspect's mind
18 off the area that you are trying to control as a law
19 enforcement officer, right?

20 A Yes.

21 Q When you teach distraction strikes, you do not teach
22 officers to hit as hard as they can, do you?

23 A When we teach that block instruction, it falls under
24 stunning and distraction. Sometimes the question comes up,
25 what do we mean by "stunning" and "distraction"? I guess the

1 easiest way to explain it is a distraction is a short time. A
2 stunning distraction would take a little bit longer.

3 And you if you can imagine that in order for something to
4 cause pain or motor dysfunction to take a little bit longer,
5 you have to hit it harder. Where, in a distraction technique,
6 it doesn't necessarily mean it's a light strike, it doesn't
7 necessarily mean it's a hard strike.

8 I would say it's safe to say a distraction technique
9 might not rise to the level of an all-out, you know, full
10 power hit. But I guess the example that I could give the jury
11 would be one of our stunning distraction techniques is a smack
12 to the forehead. Typically, we try to teach that as an open
13 hand or back of the hand, where you might smack someone,
14 someone might say, pretty hard. So I think it's kind of
15 subjective at that point as far as the hardest you hit.

16 Q So do you teach officers to hit as hard as they can when
17 they deliver a distraction strike? You don't, do you?

18 A Not on all targets for distraction techniques.

19 Q Not in the head for distraction techniques?

20 A No, not necessarily. Like I said, you might use not a
21 punch but a slap. And I think we've talked about that before,
22 that you might have to generate some power in order to do
23 that. But I wouldn't necessarily call it a full-out hard
24 strike. It's a strike, meaning you're making contact, but not
25 a punch I think that some people might have in their head.

1 Q When you reached your opinion in this case, were you
2 aware that Scott Wyatt admitted hitting Michael Wyatt in the
3 face with his fist as hard as he could?

4 A I don't recall that.

5 Q Would it have changed your opinion possibly if you knew
6 that he admitted hitting Michael Wyatt with his fist in the
7 face four to eight times?

8 A I think under these circumstances I would say, no, it
9 would not. And the reason I say that is, given the situation
10 at that given time that Investigator Wyatt was dealing with
11 the situation, he had in his head the idea that there was a
12 weapon involved, and I think that raises the stakes as far as
13 dealing with the person that's noncompliant at that point.

14 Q It would have made no difference to your opinion?

15 A That's correct.

16 Q Okay. I believe you discussed this morning also the
17 notion of providing lethal cover when you believe a person has
18 a weapon on them. Do you remember that?

19 A Yes.

20 Q And you train officers to provide lethal cover when they
21 believe a person has a weapon on them, right?

22 A A lot of it is situational. Are you taught to use lethal
23 cover when it's applicable? Yes. I think the dynamics of
24 this situation, though, was that it wasn't -- it wasn't the
25 best choice to have a firearm out at that situation, being

1 that you had people that were going hands-on with the person
2 at that time, especially since they had not specifically seen
3 a firearm. They thought there was, and I think we went into
4 that discussion as far as if someone saw it, that would have
5 changed the dynamics of that situation at that time.

6 Q I see. So it's the uncertainty over whether there was a
7 weapon or not? If they were certain there was a weapon, that
8 would be different, I believe you testified earlier. But
9 here, they didn't know for sure whether there was a weapon?

10 A It would have made it easier if that weapon was displayed
11 and seen. There is uncertainty, though it had not been -- it
12 hadn't been pointed out by any of the officers.

13 Q It would have been easier on the officers if the gun was
14 visible?

15 A Can I finish that one? Yes. If the weapon was visible,
16 whether it was in the waistband or obviously in the person's
17 hand, they would have known specifically there is a firearm
18 and someone may have drawn their weapon.

19 In this, the dynamics of this situation, their training
20 and experience was that a hand is going to the right side,
21 which is typical of someone that is trying to keep in or pull
22 out something from their waistband; that when they went to the
23 ground and there were that many officers trying to gain
24 control of the person, that pulling the firearm out at that
25 point wasn't -- that wasn't the best option. There was too

1 much potential that a firearm could have been discharged at
2 one of the officers involved.

3 So it was a conscious decision that was made by -- I
4 believe it would have been Captain Nicholson at the time,
5 though he had his weapon out, it's time to holster up because
6 they were attempting to go hands-on. And I think we talked
7 about not wanting to have a firearm in our hand when going
8 hands-on.

9 Q The purpose of providing lethal cover is to protect the
10 handcuffing officer, correct?

11 A Yes, once the person is in compliance.

12 Q In case the suspect pulls a gun, you want somebody to
13 have the ability to use lethal force in response, right?

14 A That's correct.

15 Q But no one provided lethal cover here, did they?

16 A No, not in this situation, they were all hands-on.

17 Q And at the time you reached your opinion in this case,
18 you didn't know why the defendants chose not to provide lethal
19 cover, did you?

20 A I could only assume as to why they chose not to just
21 based off my training and experience.

22 Q So you didn't know?

23 A I didn't know why they chose not to, other than what my
24 assumption would have been based off my training and
25 experience.

1 Q When you reached your opinion in this case, you didn't
2 know of any reason why Tommy Nicholson would have holstered
3 his gun out, did you -- holstered his gun, rather?

4 A I'm sorry, can you repeat that?

5 Q Sure. When you reached your conclusion in this case, you
6 didn't know of any reason why Tommy Nicholson wouldn't have
7 had his gun out?

8 A My assessment --

9 Q Go ahead.

10 A I was going to say, my assessment would be that he had it
11 out initially but then he holstered his weapon as he was
12 getting ready to go hands-on on that right side of Mr. Michael
13 Wyatt, thus the reason that he put his weapon away. That
14 would be my rationale as far as why he didn't have it out, if
15 I'm answering your question.

16 Q I'm not sure if you answered it or not. You knew of no
17 reason why Nicholson's weapon would not have been out when you
18 reached your opinion in this case, did you?

19 A A lot of double negatives in there. I knew of no reason
20 as to -- can you repeat that one more time?

21 Q Sure.

22 A Or maybe ask it a different way.

23 Q You know of no reason at the time you reached your
24 opinion why Nicholson would have put his gun away, did you?

25 A My reason would be that he was going hands-on, and thus

1 he put his weapon away so he wouldn't have his firearm in his
2 hand as he was attempting to go hands-on.

3 Q That's your reason today, it was not your reason when you
4 made your conclusion in this case, was it?

5 A Based off my observations, that would have been part of
6 it.

7 Q Page 139, line 17. "Question: There is no reason why
8 Nicholson's weapon wouldn't have been out in a position to
9 provide some cover, right?"

10 "Answer: I think there could be a reason. And this -- I
11 think this would just come from, I guess, him knowing himself.
12 One of the things that, you know, we always talk about as far
13 as factors deal with fatigue and injury. It seemed to me that
14 when he stood up, he was worn out."

15 A Okay. I think --

16 Q Is that your opinion today, that he was worn out?

17 A Well, if I can answer that question. I think we were
18 talking about two different things. I thought the initial
19 question was why was he putting his weapon away. And I think
20 I answered that.

21 As far as why he was standing up, I think he may have
22 either been fatigued or worn out from the adrenaline dump that
23 occurs during that type of trying to get a person in custody,
24 and realizing that he may have not been in the best position
25 to take control.

1 So I feel that you were kind of asking me two different
2 questions: Why did he put his weapon away? To go hands-on.
3 Why did he stand up? I think he may have been tired.

4 Q I didn't ask you why he stood up.

5 The question was: "Is there any reason why Nicholson's
6 weapon wouldn't have been out in a position to provide some
7 cover for the officers trying to handcuff Michael Wyatt?"

8 Your answer then was that he might have been tired.

9 Is that your answer today?

10 A Okay. Now that we're coming full circle with this, okay.
11 Yes, because part of my answer I believe that day dealt with
12 if he stands up and he is tired and he is pulling three --
13 unholstering his weapon again, and if he is that close to
14 somebody and if he is that tired, there's a good chance he's
15 not going to have that accurate shot if he needed to take it.
16 So I think it was a conscious decision on his part to keep the
17 weapon inside, because it was not necessarily the safest
18 thing. And he was assessing that situation at hand as far as
19 how those officers were trying to take control of him.

20 Q Investigator Owens successfully used a wristlock to
21 secure Michael Wyatt's left arm, didn't he?

22 A Yes.

23 Q But only after he punched Michael Wyatt six times, right?

24 A I don't know the number. I'm not sure as far as what led
25 up to it, but, yeah, eventually he was able to get a wristlock

1 applied on the left side, correct.

2 Q He didn't try it first, he only tried it after he hit him
3 six times, right?

4 A I believe so.

5 Q As an instructor, you do not teach officers to punch
6 anyone who is already on the ground, in the prone position, do
7 you?

8 A Based on the dynamics of the situation, if you're unable
9 to get your hand placement where you want it to be -- and by
10 "hand placement," to put anyone in any control hold, I
11 mentioned earlier there's a technique that we refer to as the
12 law enforcement grasp, and where you're trying to get ahold of
13 that person is specifically at the wrist and right behind the
14 elbow. So until you're able to get your hands in those
15 positions, you have -- that's the only way you're going to be
16 able to start transitioning into the different types of joint
17 locks that there are.

18 If a person is tightened up, you may need to deliver
19 stunning distraction techniques into that area, once again, in
20 order to loosen that tightened arm up, in order to take
21 control of it so you can manipulate that arm into that proper
22 positioning in order to eventually get into that wristlock
23 lock that Investigator Owens got into.

24 Q I'll ask it again. You do not teach officers to punch
25 suspects laying prone on the ground, do you?

1 A It's not that easy an answer -- or it's not a
2 black-and-white answer. There's a gray answer to this,
3 because depending on the situation that you have, you may need
4 to teach that and, yes, we do teach that. We do teach that if
5 you need to deliver stunning distraction techniques into an
6 arm or wherever to gain control of that appendage, then, yes,
7 it is admissible -- or acceptable. I'm sorry.

8 Q So you teach it? You do? That's your testimony?

9 A We do.

10 Q Punches to the face? I think you already testified you
11 didn't do that.

12 A I testified to the fact that we use -- there are stunning
13 distraction areas along the face. You try to avoid using your
14 fists because it's most likely going to cause damage to you as
15 well as the person.

16 Q Investigator Owens eventually used that wristlock to
17 secure Michael Wyatt's arm, as you said.

18 A Yes.

19 Q You don't know of anything that prevented Investigator
20 Owens or the other officers from using a wristlock, rather
21 than punching, to secure the arm in the first place, do you?

22 A I would only be assuming that they were unable to get
23 their hands in the proper position as far as I described as
24 the law enforcement grasp, in order to manipulate the arm into
25 that position. That would be the only thing that I would be

1 able to offer on that.

2 Q So you don't know of anything that prevented them from
3 using it?

4 A The only thing that would have prevented him from using
5 it is actually having access to the specific targets on the
6 arm in order to grasp and manipulate.

7 Q But you didn't know that when you reached your opinion in
8 this case, did you?

9 A It would have been a reasonable assumption that I made as
10 far as assessing the statements and everything with it.

11 Q Page 11, line 5.

12 "Question: What prevented the officers on the --
13 involved in the Wyatt arrest from using a wristlock to secure
14 the suspect?"

15 "Answer: What prevented them?"

16 "Uh-huh."

17 "Answer: I don't know."

18 Almost there. Let's talk about knee strikes one more
19 time.

20 A Okay.

21 Q You teach your officers not to deliver a strike if
22 they're unsure of the target, right?

23 A That is correct. They should know their target.

24 Q Because if a knee strike is used incorrectly, it poses a
25 risk of serious potential injury, right?

1 A Depending on where it makes contact.

2 Q I'm sorry, I didn't hear that.

3 A I said depending on where it makes contact.

4 Q Right. There's a potential risk of serious injury?

5 A Correct.

6 Q If a person is on the ground, you teach an officer to
7 strike with their hands, not with their knees, right?

8 A Going back to what I've testified before to is we teach
9 specific targets. Ideally you would like to use your hands,
10 but sometimes your hands are not an option, so you learn to
11 use other personal body weapons, whether it's your knees, your
12 elbows, your fists, your feet.

13 Q But you don't train anyone to use a knee on a subject who
14 is already on the ground; you train them to use their hands,
15 right?

16 A No. What I'm saying is we teach targets. And in the
17 training that we provide, that we discuss that as an option,
18 that this may be something that you need to do.

19 Q Page 110, line 23. "Question: Do you teach knee strikes
20 for a subject who is on the ground?"

21 "Answer: We teach, given the situation, if there was a
22 need to target someone, we would try to deliver a strike, if
23 need be, with our hand, because it's something you are able to
24 control a little bit more."

25 A Correct, I said that.

1 Q That was true when you said that, right?

2 A Yes. And if I recall, I think that there is more where
3 it talked about utilizing a knee, or using other parts.

4 Q There is. "Lifting your leg -- it's -- it's going to put
5 you more off balance, because if you're already on the ground,
6 you want to try to stay as grounded as you are."

7 A Yes. And then there was also more where I talked about
8 where the target was in front of me. And I think I made the
9 reference that your knee, if you can imagine your knee almost
10 like a piston, that you know where it is in front of you, that
11 you can deliver that strike, knowing where your knee is
12 relative to the rest of your body and knowing where that
13 target is, that you can deliver it.

14 Q I'm happy to read the rest of your answer.

15 "So the technique, a strike to that area if it's
16 accessible, you would still feel it. But I don't feel how the
17 person who's the ground just -- I guess the physics that are
18 related to that knee coming and generating power into the side
19 of a person, there is a lot of potential for even more, you
20 know, injury to occur to that officer if they are trying to
21 target and not getting the full effect of the technique as
22 when it is standing."

23 That is your full answer.

24 A And does it go on to talk a little bit about the piston
25 reference?

1 Q The next question does not involve a piston.

2 A Okay.

3 Q Before this case, Lieutenant, you had never seen an
4 officer knee a civilian in the head, had you?

5 A I had never seen an officer knee somebody in the head
6 during -- no.

7 Q Because a hard strike to the head is considered a lethal
8 use of force, right?

9 A Yes.

10 Q And the strikes you saw on that video were hard strikes,
11 right?

12 A I saw the strikes; they appeared to be powerful. I
13 couldn't tell you how hard they hit with, but they appeared
14 powerful.

15 Q When you reached your opinion in this case, you thought
16 it would be difficult to articulate a justification for a knee
17 to the head area if the civilian's arms were under control,
18 didn't you?

19 A I said that if a person's arms were under control, that
20 it would be difficult to articulate the knee to deliver a hard
21 strike specifically to the head, yes, sir.

22 Q You said you would just be speculating if you tried to
23 give a reason why an officer --

24 A I'm sorry, I didn't hear the first part.

25 Q No problem. You said you would just be speculating if

1 you tried to give a reason why an officer would knee a
2 civilian in the head?

3 A Yes. Under those circumstances of having hands under
4 control and specifically targeting someone in the head, I
5 would be speculating, yes, sir, that's correct.

6 Q Michael Wyatt, as I believe you testified earlier this
7 morning, was not a lethal threat when the four officers were
8 holding him down, were they -- was he?

9 A Was he a lethal threat?

10 Q Did he create a deadly force situation when there are
11 four officers on top of him?

12 A Though there was the perception that it could have been,
13 no, not without them specifically seeing a gun.

14 Q Hypothetically, if a knee strike was intended and
15 actually hit the head, that would be deadly force, wouldn't
16 it, for a subject who is on the ground, held down?

17 A And just to clarify, held down and under control?

18 Q One officer is on his left arm, one officer is on his
19 right arm, one officer is on his torso, one officer is on his
20 back, and then there's a knee strike to the head. That is
21 deadly force, wouldn't it be?

22 A If it is a specific target to that person's head and they
23 are unable to articulate that this was a lethal situation,
24 yes.

25 MR. BEATON: I have nothing further.

REDIRECT EXAMINATION

BY MR. GUYNN:

Q Was Michael Wyatt under control when the knee strikes were delivered?

A In my assessment of it, he was not under control; thus, the need when the fifth officer -- or, I'm sorry, investigator, Investigator Worsham made his approach, he wasn't under control. It wasn't until he delivered those knee strikes to the area that I believe to be that shoulder, which seems to be under contention, it was only after those knee strikes that they were able to place the person in handcuffs.

Q And, excuse me, I want to make clear. You assume for purposes of your opinion that the officers' belief that Michael Wyatt had a pistol was reasonable?

A Yes. That was part of my assessment, that the officers were going into this situation, that they were dealing with a person that was a wanted felon, that he was considered armed and dangerous, that he was in recent possession of a firearm, and that he had made a movement that most people in law enforcement would see as an action indicative of someone trying to either maintain control or retrieve something from their waistband, knowing that the waistband is a commonplace that someone would conceal a firearm.

Q And the force that was used was appropriate based on that belief?

Jury Instructions

1 A I believe that it was an appropriate use of force.

2 Q If they had pulled his hand out, got him handcuffed, knew
3 he didn't have a gun and used the same force, you wouldn't be
4 here, would you?

5 A That's correct.

6 Q Because you don't believe that would have been
7 appropriate, do you?

8 A (Nods head up and down.)

9 Q But that belief is what has driven your opinion?

10 A That's correct.

11 MR. GUYNN: That's all I have.

12 THE COURT: All right. Okay. Thank you. You may
13 step down.

14 MR. GUYNN: The defense rests.

15 DEFENSE RESTS

16 THE COURT: All right. The defendants rest.

17 MR. BEATON: Could we have just a moment, Your Honor?

18 THE COURT: All right.

19 (Pause in the proceedings.)

20 MR. TODD: Your Honor, no redirect -- or no rebuttal.
21 We're done.

22 THE COURT: All right. Thank you.

23 Members of the jury, you've heard all the evidence in
24 the case. It becomes my duty, therefore, to instruct you on
25 the rules of law that you must follow and apply in arriving at

Jury Instructions

1 your decision in the case.

2 You, as jurors, are judges of the facts, but in
3 determining what actually happened in the case, that is, in
4 reaching your decision as to the facts, it is your sworn duty
5 to follow the law I am now in the process of defining for you.

6 Do you want to put the instructions on the ELMO?

7 THE LAW CLERK: Do you want to put them up?

8 THE COURT: Yeah.

9 THE LAW CLERK: I will need a minute.

10 THE COURT: You don't have a copy? I will finish the
11 one I'm reading.

12 You have no right to disregard or give special
13 attention to any one instruction or to question the wisdom or
14 correctness of any rule I may state to you. That is, you must
15 not substitute or follow your own notion or opinion as to what
16 the law is or ought to be.

17 It is your duty to apply the law as I give it to you,
18 regardless of the consequences. By the same token, it is also
19 your duty to base your verdict solely upon the testimony and
20 evidence in the case without prejudice or sympathy.

21 That was the promise you made and the oath you took
22 before being accepted by the parties as jurors in this case,
23 and they have the right to expect nothing less.

24 I will go on and read the third instruction, then.

25 In this case, the defendants are governmental

Jury Instructions

1 officials while the plaintiff is a private citizen. All
2 parties are equal before the law and are to be dealt with as
3 equals in a court of justice. All parties are entitled to the
4 same fair consideration. You are thus not to afford any more
5 credibility to statements made by a witness or a party because
6 he is a governmental official. And you are not to afford any
7 less credibility to statements made by a witness or a party
8 because he is or was a private citizen.

9 This case should be considered and decided by you as
10 an action between persons of equal standing in the community,
11 of equal worth, and holding the same or similar stations in
12 life.

13 Furthermore, I tell you that an individual who has
14 been charged with or convicted of a crime is entitled to the
15 same fair and impartial consideration of this case as any
16 person before the Court. Such individual does not forfeit his
17 constitutional rights merely by virtue of his arrest and
18 conviction.

19 As stated earlier, it is your duty to determine the
20 facts, and in so doing you must consider only the evidence I
21 have admitted in the case.

22 The term "evidence" includes the sworn testimony of
23 the witnesses and the exhibits admitted in the record.
24 Testimony or evidence that I struck from the record or that I
25 told you to disregard is not evidence and must not be

Jury Instructions

1 considered. Anything you may have seen or heard outside the
2 courtroom is not evidence and must be completely disregarded.

3 I'm on the third paragraph there, if you want to
4 follow me on the screen. It's also up there. I don't know
5 whether y'all can read that or not; I can't. Anyway, you will
6 have a copy of these instructions in the jury room, but try to
7 listen to them too.

8 In considering the evidence, you are not limited to
9 the bald statements of the witnesses. In other words, you are
10 not limited solely to what you see and hear as the witnesses
11 testify. On the contrary, you are permitted to draw from the
12 facts which you find to have been proven such reasonable
13 inferences as may seem justified in light of your own
14 experience. Put differently, you may use reason and common
15 sense to draw deductions or conclusions from facts that have
16 been established by the evidence in this case.

17 There are two types of evidence: direct and
18 circumstantial. Direct evidence is the direct proof of a
19 fact, such as testimony from an eyewitness. Circumstantial
20 evidence is proof of facts from which you may infer or
21 conclude that other facts exist. The law makes no distinction
22 between direct and circumstantial evidence, and you should
23 give all evidence the weight and value you believe it is
24 entitled to.

25 Any statements, objections, or arguments made by the

Jury Instructions

1 lawyers are not evidence in the case. It is the duty of the
2 attorneys for each side of a case to object when the other
3 side offers testimony or other evidence which the attorney
4 believes is not properly admissible. Counsel also has the
5 right and the duty to ask the Court to make rulings of law and
6 to request conferences at the sidebar out of the hearing of
7 the jury. All those questions of law must be decided by the
8 Court.

9 You should not harbor any prejudice against an
10 attorney or his client because the attorney objected to the
11 admissibility of evidence, or asked for a conference out of
12 the hearing of the jury, or asked the Court for a ruling on
13 the law.

14 My rulings on the admissibility of evidence do not
15 indicate any opinion about the weight or effect of such
16 evidence.

17 You are the sole judges of the credibility of all
18 witnesses and the weight and effect of all evidence. It is
19 your own recollection and interpretation of the evidence that
20 controls the case. What the lawyers say is not binding upon
21 you.

22 During the course of a trial I occasionally made
23 comments to lawyers or asked questions of a witness, or
24 admonished a witness concerning the manner in which he should
25 respond to the questions of counsel. Do not assume from

Jury Instructions

1 anything I may have said that I have any opinion concerning
2 any of the issues in this case.

3 I have said that you must consider all of the
4 evidence. This does not mean, however, that you must accept
5 all of the evidence as true or accurate.

6 You are the sole judges of the credibility or
7 believability of each witness and the weight to be given his
8 or her testimony. You may call upon your own experience and
9 background in your every day affairs in determining the
10 reliability or unreliability of statements made by others.

11 In weighing the testimony of a witness, you should
12 consider the following:

13 (1) The witness's relationship to the plaintiff or to
14 the defendant;

15 (2) The witness's interest, if any, in the outcome of
16 the case;

17 (3) The witness's manner of testifying;

18 (4) The witness's opportunity to observe or acquire
19 knowledge concerning the facts about which the witness
20 testified;

21 (5) The witness's candor, fairness, and intelligence;
22 and

23 (6) The extent to which the witness has been
24 supported or contradicted by other credible evidence.

25 Also, the weight of the evidence is not necessarily

Jury Instructions

1 determined by the number of witnesses testifying to the
2 existence or nonexistence of any fact. You may find the
3 testimony of a smaller number of witnesses as to any fact --
4 you may find that the testimony of a smaller number of
5 witnesses as to any fact is more credible than the testimony
6 of a larger number of witnesses to the contrary.

7 A witness may be discredited or impeached by
8 contradictory evidence by a showing that he testified falsely
9 concerning a material matter, or by evidence that at some
10 other time the witness has said or done something or has
11 failed to say or do something which is inconsistent with the
12 witness's present testimony.

13 If you believe that any witness has been so
14 impeached, then it is your exclusive province to give the
15 testimony of that witness such credibility or weight, if any,
16 as you may think it deserves.

17 The fact that a witness has previously been convicted
18 of a felony or any crime where proof of a dishonest act or
19 false statement was required for a conviction is also a factor
20 you may consider in weighing the credibility of that witness.
21 The fact of such conviction does not necessarily destroy the
22 witness's credibility, but it is one of the circumstances you
23 may take into account in determining the weight to be given to
24 his or her testimony.

25 You have heard testimony from expert witnesses. When

Jury Instructions

1 scientific, technical, or other specialized knowledge might be
2 helpful, a person who has special training or experience in
3 that field is allowed to state an opinion about the matter.
4 However, you are not required to accept that opinion. As with
5 any other witness, it is up to you to decide whether to rely
6 upon the testimony and how much weight to accord the expert's
7 testimony.

8 In weighing the opinion testimony, you may consider
9 the witness's qualifications, his or her opinions, the reason
10 for testifying, as well as the other considerations that
11 ordinarily apply when you are deciding whether or not to
12 believe a witness's testimony.

13 The fact that such person has given an opinion does
14 not mean that you are required to accept it. Nor should you
15 substitute it for your own reason, judgment, and common sense.
16 The determination of the facts in this case rests solely with
17 you.

18 In addition to the testimony of witnesses, the
19 evidence in this case consists of any and all exhibits that
20 have been received into evidence. Additionally, the parties
21 have stipulated or agreed that certain facts should be
22 considered true. You must treat those facts as having been
23 proved for the purpose of this case.

24 Certain diagrams may have been shown to you. These
25 diagrams are used for your convenience and to help explain the

Jury Instructions

1 facts of the case. They are not themselves evidence or proof
2 of any facts if not admitted into evidence.

3 The burden is on the plaintiff in a civil action such
4 as this to prove every essential element of his claim by a
5 preponderance of the evidence, which is the greater weight of
6 the evidence. A preponderance of the evidence means such
7 evidence as, when considered and compared with that opposed to
8 it, has more convincing force and produces in your minds a
9 belief that what is sought to be proved is more likely true
10 than not. In other words, to establish a claim by a
11 preponderance of the evidence merely means to prove that the
12 claim is more likely so than not so.

13 To state it differently, if you were to put the
14 evidence favorable to the plaintiff and the evidence favorable
15 to the defendants on opposite sides of a scale, the plaintiff
16 would need to have tipped the scale somewhat to his side.

17 In determining whether any fact in issue has been
18 proved by a preponderance of the evidence, the jury may
19 consider the testimony of all the witnesses, regardless of who
20 may have called them, and all the exhibits received in
21 evidence, regardless of who may have produced them.

22 If the proof should fail to establish any essential
23 element of the plaintiff's claim by a preponderance of the
24 evidence, the jury should find for the defendant as to that
25 claim.

Jury Instructions

1 You may have heard of the phrase "proof beyond a
2 reasonable doubt." That is a stricter standard of proof and
3 applies only to criminal cases. It does not apply in civil
4 cases such as this, so you should put it out of your mind.

5 Under the Fourth Amendment, a police officer may use
6 only such force as is objectively reasonable under all the
7 circumstances. The plaintiff claims the defendants used
8 excessive force when they arrested him. In making a lawful
9 arrest, a law enforcement officer has the right to use such
10 force as is necessary under the circumstances to effectuate
11 the arrest. Whether or not that force used in making an
12 arrest was unreasonable is a question to be determined by you
13 in light of all the evidence received in the case.

14 In order to succeed on his claim, the plaintiff must
15 prove by a preponderance of the evidence that at least one of
16 the defendants used excessive force against him on the date of
17 his arrest. You must decide whether the use of force was
18 excessive from the perspective of a reasonable officer facing
19 the same circumstances. You must allow for the fact that
20 police officers are often forced to make split-second
21 judgments in circumstances that are tense, uncertain, and
22 rapidly evolving. You must make this decision based on what
23 the particular defendant actually knew at the time each
24 distinct act of force was used, not based on what you now
25 know.

Jury Instructions

1 What is an initial use of force was justified does
2 not necessarily mean that all later uses of force were also
3 justified.

4 In determining whether use of force was excessive,
5 you should consider the totality of the circumstances,
6 including:

7 (1) the need for the application of force;

8 (2) the severity of the crime at issue;

9 (3) whether plaintiff posed an immediate threat to
10 the safety of the officers or others as perceived by
11 defendants at the time;

12 (4) the amount of force actually used;

13 (5) the relationship between the threat posed and the
14 actual force;

15 (6) whether the plaintiff was actively resisting
16 arrest or attempting to evade by flight -- arrest by flight;

17 (7) the extent of the injury suffered by the
18 plaintiff;

19 (8) whether a reasonable officer without the benefit
20 of hindsight would have used that much force; and

21 (9) whether the defendants could have obtained
22 compliance through alternative uses of force.

23 In deciding whether the plaintiff has proven that the
24 defendants used excessive force against him, I tell that you
25 the defendants' intentions are not to be considered. The

Jury Instructions

1 plaintiff must only show that the force used against him was
2 objectively unreasonable.

3 Any evidence that you heard regarding past uses of
4 excessive force by Defendant Worsham may be considered only
5 for its bearing, if any, on the question of whether you
6 believe Defendant Worsham's explanation for his use of force
7 against the plaintiff. You may not consider this as evidence
8 that Defendant Worsham used excessive force in this case.

9 However, if you find in favor of plaintiff and
10 against Defendant Worsham, you may also consider evidence
11 of -- strike that word "his," put in "any past uses of
12 excessive force in determining whether to grant punitive
13 damages." It's up to you to determine whether the evidence
14 showed any such past uses of excessive force.

15 You have heard evidence about whether defendants'
16 conduct complied or violated a given rule or policy. You may
17 consider this evidence in your deliberations, but remember
18 that the issue is whether defendant used excessive force on
19 plaintiff in violation of the Fourth Amendment, not whether a
20 rule or policy might have been violated.

21 If you find by a preponderance of the evidence that
22 plaintiff has proved that one or more of the defendants used
23 excessive force against him, then you should find for the
24 plaintiff and against such defendant or defendants. Then go
25 on to consider the question of damages.

Jury Instructions

1 On the other hand, if you find that the plaintiff has
2 not proved that any one of the defendants used against -- used
3 excessive force against him, then you should find for the
4 defendants, and you will not consider the question of damages.

5 If you find any of the defendants liable, then you
6 must consider the issue of compensatory damages. You must
7 award the plaintiff an amount that will fairly compensate him
8 for any injury he sustained as a result of any excessive
9 force.

10 You must use sound judgment in fixing an award of
11 damages, drawing reasonable inferences from the facts in
12 evidence. However, compensatory damages may not be based on
13 speculation or sympathy. They must be based on the evidence
14 presented at trial and only on that evidence.

15 The plaintiff has the burden of proving compensatory
16 damages by a preponderance of the evidence, but the law does
17 not require that he prove the amount of his losses with
18 mathematical precision. It only requires as much definiteness
19 and accuracy as circumstances permit.

20 Here the plaintiff claims the following items of
21 damages:

22 (1) physical harm, including physical pain and the
23 discomfort;

24 (2) reasonable -- that "(2)" comes out, doesn't it?

25 MR. BEATON: Yes, Your Honor.

Jury Instructions

1 THE COURT: (2) emotional and mental harm suffered
2 during and after the events at issue, including fear,
3 humiliation, and mental anguish, as well as emotional and
4 mental harm that plaintiff is reasonably certain to suffer in
5 the future.

6 No evidence of the dollar value of such pain needs to
7 be introduced. There is no exact standard for determining the
8 damages awarded based on pain and suffering. You are to
9 determine an amount that will fairly compensate plaintiff for
10 the injury.

11 The law that applies to this case authorizes an award
12 of nominal damages. If you find for the plaintiff but you
13 find the plaintiff has failed to prove damages as defined in
14 these instructions, you must award nominal damages of one
15 dollar.

16 In addition to the damages mentioned in other
17 instructions, you may also award punitive damages to the
18 plaintiff under some circumstances.

19 To obtain punitive damages, the plaintiff must prove
20 by a preponderance of the evidence that Defendant Worsham
21 either knew that his actions violated federal law or acted in
22 reckless and callous indifference to the plaintiff's safety or
23 rights.

24 If the plaintiff satisfies this requirement, it is
25 entirely up to you whether or not to award punitive damages.

Jury Instructions

1 But it should be presumed that the plaintiff has been made
2 whole by compensatory damages, so you should award punitive
3 damages only if you believe the defendants' conduct requires
4 further sanctions to achieve proper punishment or to deter
5 others from similar conduct in the future.

6 If you decide to award punitive damages, the amount
7 to be awarded is also within your sound discretion. You may
8 considering the following factors in arriving at a punitive
9 damages award.

10 (1) the nature of the defendant's conduct, (how
11 blameworthy it was);

12 (2) the impact of that conduct on the plaintiff
13 (physical, economic, or both);

14 And, again, I'm striking "economic." I don't think
15 there's any evidence of that.

16 (3) whether there was violence, intentional malice,
17 or reckless disregard for health or safety;

18 (4) Whether there was any repetition of the same sort
19 of wrongful conduct that harmed the plaintiff;

20 (5) whether -- and to what extent the defendant needs
21 to be punished in order to discourage the defendant and others
22 from similar conduct in the future;

23 (6) The likelihood that the defendant or others would
24 repeat the conduct if the punitive award is not made; and

25 (7) any other circumstances shown by the evidence,

Jury Instructions

1 including mitigating circumstances, that bear on the question
2 of the size of the award.

3 Of course, the fact that I have given you
4 instructions concerning the issue of plaintiff's damages
5 should not be interpreted in any way as an indication that I
6 believe the plaintiff should or should not prevail in this
7 case.

8 Your verdict must represent the considered judgment
9 of each juror. In order to return a verdict, it is necessary
10 that each juror agree thereto. In other words, your verdict
11 must be unanimous.

12 It is your duty as jurors to consult with one another
13 and to deliberate in an effort to reach agreement. And if you
14 can do so without violence to individual -- if you can do so
15 without violence to individual judgment. Each of you must
16 decide the case for yourself, but only after an impartial
17 consideration of the evidence in the case with your fellow
18 jurors.

19 In the course of your deliberations, do not hesitate
20 to reexamine your own views and change your opinion if
21 convinced it is erroneous. But do not surrender your honest
22 conviction as to the weight or effect of the evidence solely
23 because of the opinion of your fellow jurors or for the mere
24 purpose of returning a verdict.

25 Remember at all times you are not partisans; you're

Jury Instructions

1 judges, judges of the facts. Your sole interest is to seek
2 the truth from the evidence in the case.

3 The final verdict I will read after the argument.

4 Members of the jury, we're going to take about a
5 15-minute recess before we start with the closing arguments,
6 so don't start deliberating yet, until after you retire
7 following the arguments. You may go to the jury room. I'll
8 ask the attorneys to stay just a minute.

9 (Jury out at 2:37 p.m.)

10 THE COURT: All right. Anything that I didn't
11 correct in the instructions, that you saw?

12 MR. GUYNN: It occurred to me, Your Honor, there is
13 not a sympathy, bias, or guesswork.

14 THE COURT: Not a what?

15 MR. GUYNN: Not an instruction that advises the jury
16 not to use sympathy, bias, or guesswork.

17 THE COURT: I think there is. I remember reading
18 something there. I'm pretty sure. Yeah, Instruction 1, the
19 last paragraph.

20 MR. GUYNN: I'm sorry.

21 THE COURT: I don't normally, you know, put time
22 limits on the lawyers because -- unless I know they don't have
23 a clock. But I gather y'all have prepared closing arguments
24 or have some idea what you're going to say?

25 MR. GUYNN: I would like to think so.

Closing Arguments by Mr. Todd

1 MR. TODD: I do have some prepared remarks. I don't
2 know how long it will take. It won't be hours.

3 THE COURT: Okay. Well, you all know, as I say very
4 few souls are saved after the first 15 minutes.

5 We need Defendant's Exhibit 1 redacted as agreed on
6 the record yesterday.

7 MR. TODD: We have that. I'm going to get it now.
8 We have that.

9 THE COURT: Okay. We'll recess. We'll come back
10 within 15 minutes.

11 (Recess taken from 2:39 p.m. to 2:56 p.m.)

12 THE COURT: All right, Mr. Todd, you may proceed.

13 MR. TODD: Thank you, Your Honor. Welcome back.

14 They say there are three kinds of closings you can
15 give: The one you prepared the night before, that you intend
16 to give; the one you actually get up and bumble through; and
17 then the phenomenal streamliner you give in the shower the
18 next morning. We're not in the shower, but I will see what I
19 can do for you.

20 Thanks for bearing with us. We know this is horrible
21 for you. But your participation here is very important and
22 critical to justice for both parties, for all the parties.

23 So where are we? As I told you in my opening, the
24 defendants' use of force in this case is never really going to
25 be contested in any serious degree, and the evidence has

Closing Arguments by Mr. Todd

1 largely borne that out. We've heard some excuses --
2 distraction blows, jabs, a number of strikes, I meant to hit
3 one thing and I hit something else -- but nothing that really
4 changes the equation.

5 Scott Wyatt punched Michael Wyatt in the head or neck
6 four to eight times. By his own testimony, he used his right
7 hand to peel Mr. Wyatt's head back, and his left hand to
8 deliver powerful punches, four to eight of them, punches as
9 hard as he could punch in the face and neck.

10 And although he denied it at first, when he first
11 testified, he later admitted when confronted with the video
12 that some of these were delivered not from a prone position,
13 but from a kneeling position, powerful, downward punches.

14 Investigator Owens punched Mr. Wyatt in the lower back.
15 These are the strikes, of course, that are most clearly
16 visible on the video, hard, sharp, downward blows.

17 Now, Mr. Owens testified that these punches were merely
18 jabs, distraction blows. Well, we weren't there, we didn't
19 feel them. You can watch the video and determine whether
20 these are the kind of short jabs he demonstrated from the
21 witness stand or the sort of arm fully back, full-power blow
22 that both experts testified is not a distraction blow.

23 And, in fact, you'll recall Mr. Owens testified, admitted
24 on cross-examination that he was throwing the hardest punch
25 that one can throw from that position.

Closing Arguments by Mr. Todd

1 Thirdly, we have Mr. Worsham. Mr. Worsham delivered five
2 knee strikes to Mr. Wyatt's upper body. We believe the
3 evidence shows his head or his neck. What did we hear from
4 him? Well, first we heard, "I tried to punch him first."
5 Well, that doesn't really help the situation; that's just one
6 more attempted strike.

7 But then we go to the knee strikes. Second he tells us
8 that he intended to punch Mr. Wyatt's arm -- or knee Mr.
9 Wyatt's arm, rather. Well, the truth is that Mr. Worsham has
10 no idea where his blows landed.

11 Today we heard a complete denial, a blanket denial, with
12 confidence, that he hit Mr. Wyatt's head. Well, that's
13 understandable after the way the evidence came in, because
14 Mr. Worsham knows that a knee thrown purposely or recklessly
15 to the head contravenes every bit of police teaching he's ever
16 heard, and certainly all the evidence from both experts in
17 this case.

18 His testimony today was, of course, as you well know,
19 contrary to his testimony on Tuesday, and utterly and flatly
20 contrary to his sworn deposition given earlier in this case,
21 as I read in the record. The fact of the matter is he has no
22 idea where they landed. Maybe they hit the shoulder, maybe
23 they hit the neck, maybe they hit the head.

24 The one place we know that they did not hit was the arm,
25 because Mr. Worsham testified he was focused on this target

Closing Arguments by Mr. Todd

1 area. He was focused on the arm and he didn't see them land,
2 so they didn't hit the arm. The best evidence of where his
3 blows landed is, sadly, Mr. Wyatt's face.

4 Dr. Smith testified that the right side of Mr. Wyatt's
5 face shows three distinct instances of localized blunt force
6 trauma, including into the eye socket. The only cause that
7 anyone has talked about in this case that could have caused
8 that injury to that eye is Mr. Worsham's knee, not the
9 pavement. It's not road rash. It's not a car door; that
10 doesn't penetrate the eye socket. It's the end of the knee.
11 That's the cause.

12 There is no serious question, ladies and gentlemen, in
13 this case, as to the force the defendants used.

14 Now, His Honor instructed you a few minutes ago about the
15 question in this case. And the question isn't whether force
16 was used. Of course the police are allowed to use force. Of
17 course, absolutely, they must be able to accomplish lawful
18 objectives. As Mr. Waller said, we want the police to win,
19 that's the point.

20 The question here is not whether it was used. The
21 question is whether it was objectively reasonable force or
22 excessive force. And His Honor instructed you on a number of
23 criteria to consider in answering that question. And I want
24 to take them in groups.

25 First, the need for the application of force and the

Closing Arguments by Mr. Todd

1 amount of force actually used. What type of situation is
2 this? And did the officers use force appropriate to that
3 situation? In answering that question, the sheriff's
4 department own's policy are helpful to look at, because they
5 define deadly force and nondeadly force.

6 The sheriff's policy defines deadly force as, "Any force
7 used against another that is likely to cause death or serious
8 bodily injury." So death or serious bodily injury equals
9 deadly force.

10 And the other type of force used is nondeadly force.
11 Both experts agree these definitions are widely agreed upon
12 and widely used.

13 Each of the defendants here acknowledged that he has been
14 trained in the use of force and has been trained to avoid
15 certain target areas, whether it's the head, the neck, the
16 spleen, internal organs, the groin. You avoid these areas
17 ordinarily.

18 The defendants all agreed that strikes should be directed
19 to soft tissue, fleshy areas, muscular parts of the body to
20 impose pain but not cause serious injury. Both expert
21 witnesses, Mr. Waller and Mr. Wershbaile explained to you
22 exactly the same thing, the same training, the same goals.

23 The point of these restrictions are because blows, hard
24 blows to those areas can cause serious physical injury or
25 death. Knee strikes and punches can crush bone or can break

Closing Arguments by Mr. Todd

1 bone, shatter bone, or crush organs.

2 There's one thing that everyone also agreed on, every
3 witness you heard from: These restrictions do not apply in a
4 deadly force situation. Gloves are off, the officers can do
5 whatever they need to do to accomplish their objective,
6 because in that case they're fighting for their lives.
7 Everyone agrees with that.

8 What does that mean? Two things: First in this case,
9 the officers here used what is by any measure deadly force:
10 Fists to the head, knees to the head, fists to the kidney.
11 Deadly force.

12 So the question for you is: Was this a deadly force
13 situation? And we're going to consider the reasonableness of
14 the force used. Captain, now Major Nicholson, answered that
15 question for us this morning. No, not a lethal force
16 situation. He put his gun away. He was not going to shoot
17 Michael Wyatt in the head.

18 Now, all of the defendants, you will recall, said, "I
19 feared for my life. I feared there was a gun. It was a
20 deadly force situation." Scott Wyatt testified to that
21 precisely, deadly force situation. Captain Nicholson
22 disagreed. Mr. Wershvale similarly today said this was not a
23 deadly force situation.

24 If you conclude that Mr. Worsham could have got out of
25 his car, walked over to Mr. Wyatt, and shot him in the head,

Closing Arguments by Mr. Todd

1 that's a deadly force situation. There's no difference
2 legally between a bullet to the head or a knee to the head.
3 Any other situation, a nondeadly force situation, this force
4 was excessive.

5 The fact of the matter, ladies and gentlemen, is that
6 this situation was deescalating, not escalating. We heard
7 about force ratios: number of officers, number of suspects.
8 Two to one, three to one, four to one, five to one. It's
9 becoming increasingly less risky, not increasingly more risky.
10 But these officers responded with increasing levels of deadly
11 force: fist to the face, fist to the kidney, knees to the head
12 or neck. That is an improper response, an objectively
13 unreasonable response.

14 Another criteria His Honor gave you was, was the suspect
15 fleeing or resisting. Now, we've heard a lot about the car
16 chase. That's to be expected; hardly a surprise.

17 Now, putting aside that a ten-minute car chase over
18 3.9 miles comes to about 24-mile-per-hour average -- I have a
19 sixth grader, so that's the kind of math I wrestle with on a
20 daily basis. Putting that aside, the car chase here is not a
21 relevant question. The question is what happens once
22 Mr. Wyatt is on the ground.

23 The fact that someone has done something, has fled from
24 the police or done something stupid does not justify any
25 subsequent use of force. Everyone agreed, the experts and the

Closing Arguments by Mr. Todd

1 officers agreed that use of force should be assessed in the
2 moment, what's going on at that point in time. So what is
3 going on after Mr. Wyatt is out of his car, once he's on the
4 ground, that's the relevant point in time.

5 Now, I told you in opening that there will be some
6 variation in the fine details. For example, which way did
7 Mr. Wyatt run? Well, we've got three directions. No one said
8 he ran back towards -- I know I'm pointing that way, but the
9 way he came from. We've got towards Memorial, towards the
10 building, down the parking lot.

11 Mr. Shelton this morning corroborated Mr. Wyatt's
12 testimony that he actually ran towards Memorial Drive first.
13 That doesn't matter, because what the evidence did show
14 unambiguously was that Mr. Wyatt was on the ground within
15 seconds with two officers, then three officers, then four
16 officers on top of him.

17 At that point, he is not fleeing. By the officers' own
18 testimony, by Mr. Worsham's testimony in the opening minutes
19 of this trial, he was incapable of fleeing. He was moving at
20 zero miles an hour. It's a separate question whether he was
21 resisting. Let's separate fleeing.

22 The defendants admit that Mr. Wyatt neither punched nor
23 kicked, lashed out in any way, spat, tried to bite, did
24 anything offensive towards any of them. To the extent he was
25 resisting, it was passive resistance, not active resistance.

Closing Arguments by Mr. Todd

1 And that matters, as Mr. Wershbaile explained to you. To the
2 extent he was moving, it was squirming, flinching, or failing
3 to pull out his right arm. And that's what they're talking
4 about when they're talking about resisting arrest, passive
5 resistance.

6 The fact of that matter is, the defendants put Mr. Wyatt
7 in an impossible situation. They gave him two instructions:
8 "Stop resisting" or "Stop fleeing," and "Give us your arm."
9 Well, I don't know about you, but my favorite part of the
10 trial was him squawking like a chicken.

11 As Mr. Waller described very aptly, it does not take much
12 force to keep someone on the ground. In fact, you heard from
13 Mr. Shelton, from Allen Shelton this morning, that he used
14 exactly the technique that Mr. Waller described, a knee to the
15 lower back, the buttocks area. It stops someone from rising
16 up.

17 Mr. Wyatt was held to the ground by a hold that prevents
18 him from getting up. He wasn't held down just by one person
19 but four people. I didn't ask everyone how much they weigh,
20 but you can guess. I don't know, 800 pounds of officer if
21 they chose to apply that level of force, but at the same time
22 they're arguing, "Give us your right arm."

23 As Mr. Waller demonstrated, you can't pull that arm out.
24 It doesn't move laterally like that. You have to move to pull
25 that arm out. And if you move or if your body gets moved by

Closing Arguments by Mr. Todd

1 officers pulling and poking on you, you get punched for
2 resisting arrest.

3 They weren't beating him because he was trying to flee or
4 resisting. They hit him because of the circumstances of their
5 own creation. That is not fleeing or resisting.

6 The related question is whether the defendants could have
7 achieved compliance through alternative means, and I've
8 already touched on this. Yes, absolutely. Means and
9 mechanisms existed for controlling Mr. Wyatt and pulling his
10 arm out safely. Mr. Waller demonstrated them and
11 Mr. Wershbaile demonstrated them. Get control of the limbs,
12 calm the suspect down, control the suspect, pull the arm out
13 carefully and safely. The defendants did none of that before
14 they hit him.

15 These types of methods exist for the safety of officers
16 and the public. Officers are trained so they know how to
17 respond to an emergency situation, so they already know what
18 to do. It's almost automatic. It's muscle memory, so they're
19 not making up procedures on the fly and doing something that
20 may put themselves in danger. So too they're intended to
21 protect the public, because the point is to secure a suspect
22 safely and then let them be arrested and be adjudicated and be
23 punished by the court system, not by the officers.

24 His Honor also instructed you to consider factors such as
25 the risk perceived, the relationship between the risk and the

Closing Arguments by Mr. Todd

1 force actually used, and what a reasonable officer would have
2 done in that situation. And these criteria really come down
3 to the heart of the matter: Have you heard any evidence that
4 justifies the use of deadly force in this situation? The only
5 justification the defendants have given is what I told you in
6 opening they would give, this claim that they feared there was
7 a gun, that they had a reasonable fear that Mr. Wyatt had a
8 gun.

9 I told you three things in opening. First, there would
10 be no gun; secondly, officers had a clear view of his hands;
11 and third, the officers' behavior would be inconsistent with a
12 fear of there being a gun. I believe the evidence bears out
13 all three.

14 First of all, Mr. Wyatt had no gun in his hand, his
15 waistband. There's nothing, nothing that would explain a hand
16 near his waistband, so that legitimately calls that testimony
17 into question.

18 Secondly, the officers had clear views of his hands.
19 Mr. Worsham, from up on Memorial Avenue, saw Mr. Wyatt's hands
20 and they were empty when he got out of the car. He saw
21 Mr. Wyatt run and Mr. Wyatt was running normally.

22 Investigator Wyatt, similarly, from a car and a half
23 away, about this length, saw Mr. Wyatt's hands and they were
24 empty when he got out of the car, and the chase ensues.

25 Investigator Owens saw Mr. Wyatt's right hand as he went

Closing Arguments by Mr. Todd

1 by the car, and he saw no gun in that hand.

2 The officers, the defendants, nonetheless argue, want you
3 to believe that at some point between them seeing his hands
4 and him being taken down, a matter of mere seconds, he somehow
5 produced a gun or they saw some movement or a positioning that
6 made them reasonably believe he had a gun.

7 And this is really the heart of the case: The evidence
8 shows that the defendants' belief -- sorry -- the defendants'
9 conduct from start to finish is inconsistent with them having
10 actually believed that, with them having seen something that
11 made them believe that. And at the risk of trying your
12 patience, I'm going to offer you ten reasons to think about.

13 First, they had already -- and this precedes the event --
14 they had already removed their tactical gear. They had no
15 tasers, they have no ASP, they had no mace, any of that. That
16 was gone. So when they were searching for him, they
17 apparently thought he wasn't quite dangerous enough that they
18 would take their tactical gear off. But they show up without
19 it, even those officers who had the time to put it back on,
20 knowing they had seen his car.

21 Secondly, every officer rushed to engage him physically.
22 No one hesitated for a second. Some run faster than others
23 apparently, but everyone rushed straight in there, behavior
24 inconsistent with believing that a suspect may have a gun and
25 may turn around and shoot you.

Closing Arguments by Mr. Todd

1 Third, and relatedly, no officer hung back to provide
2 lethal cover of any sort.

3 Nor, fourth, did any officer pull his weapon, close up or
4 far away. Both experts explained that when you have multiple
5 officers, everyone doesn't need to get involved physically.
6 You could pull a gun, you could provide cover. It's not a
7 matter of, can I shoot someone now? It's a matter of
8 anticipating what might go wrong if they actually have a gun,
9 if a shot actually goes off, if this situation changes.

10 Both experts used the same phrasing: Action is faster
11 than reaction. If the gun is already out, you can take action
12 when the unexpected happens. If you're waiting until then to
13 pull your gun, it's too late. They had multiple officers
14 here, but no one thought to pull a gun, no one thought to
15 provide lethal cover.

16 Fifth. None of the officers' conduct was consistent with
17 there actually being a reasonable fear about the right arm.
18 Scott Wyatt claims he punched Mr. Wyatt because his arm was
19 underneath him. But he stopped punching him when the arm was
20 still underneath him, he stopped using force.

21 Mr. Owens similarly stopped punching while the arm was
22 still underneath. They didn't continue through until it was
23 out.

24 Captain Nicholson actually grabbed the arm and held it,
25 tried to pull it out, he testified, but then stepped up and

Closing Arguments by Mr. Todd

1 stepped away. Apparently not too concerned about the arm.

2 Sixth. The defendants claim that they wanted his right
3 arm out as fast as possible, that's what they were trying to
4 do. This is one of the more important points. That purpose
5 is completely inconsistent with a fear there is a gun in that
6 hand.

7 You may have noticed this morning when Mr. Guynn was
8 talking to Mr. Wershbale and he asked him the question: Is
9 there anything inconsistent with the situation about getting
10 the arm out as fast as possible? And Mr. Wershbale looked
11 very uncomfortable, and Mr. Guynn quickly retracted the
12 question, because he knew the answer, and it wasn't a good
13 answer for the defendants.

14 Pulling that arm out quickly, if there is a gun in there,
15 makes no sense. It's uncontrolled. It may still be in his
16 hand. If it goes off when it's underneath him, he is going to
17 shoot himself. If you pull it out here, as Mr. Wershbale
18 testified when Mr. Beaton asked him the same question, more
19 chance of accidental discharge. It would be a poor choice, he
20 said, a poor choice to pull that gun out. So their attempt to
21 pull the hand out is not consistent with there being a belief
22 that it had a gun in it. It's actually just consistent with
23 them trying to handcuff him.

24 For the same reason, hitting and kneeing Mr. Wyatt is not
25 consistent with believing he has a gun. It makes it more

Closing Arguments by Mr. Todd

1 likely that a gun goes off, more likely that someone gets
2 shot, not less, because as Mr. Waller explained, they're not
3 control tactics.

4 Eighth. Three of the six officers, Nicholson, Shelton,
5 and the driver of the car that recorded, the incident decided
6 there was no need for the use of force.

7 Ninth. No one ever yelled "gun." Not only did no one
8 ever yell "gun" -- I appreciate the testimony about how
9 officers might react to that -- none of these officers chose
10 to communicate to their fellows that day what they are now
11 communicating to you. He was running funny, his hand was near
12 his waistband, there may be a gun underneath him, none of this
13 was communicated.

14 If you are so concerned for your safety and the safety of
15 your fellow officers, would you not share that critical piece
16 of information, particularly with Mr. Worsham who is not with
17 you? He is driving around the corner in his car, he hears
18 none of this. No one says a word.

19 And, lastly, as the videotape showed, once Mr. Wyatt is
20 handcuffed, none of these five gentlemen -- well, these three
21 gentlemen, take the time to roll him over and look underneath
22 him to see if there was in fact a gun.

23 If you're the arresting officer and you think there may
24 have been a gun there, you don't leave it there under the
25 suspect, whether he's handcuffed or not. That makes no sense.

Closing Arguments by Mr. Todd

1 For all these reasons, ladies and gentlemen, the
2 defendants' claims today, which they could offer in basically
3 any case, "Oh, I thought there was a gun and so, therefore, my
4 use of force was justified," it simply doesn't wash.

5 Lastly -- well, an additional factor His Honor told you
6 to consider, extent of the injuries to the plaintiff. You've
7 heard them. I'll talk about them in a minute in the
8 conduct -- in the course of talking about damages.

9 The fact of the matter is these defendants weren't
10 reacting. This wasn't a split-second decision. They each had
11 time to think about what they were doing.

12 Scott Wyatt tackled Mr. Wyatt to the ground, wrapped
13 around him and punched him. That's an offensive reaction, not
14 a defensive reaction.

15 Mr. Owens came running over; he had time to think about
16 it as he was approaching. Contrast his approach to Captain
17 Nicholson. Captain Nicholson comes up, puts his gun away,
18 kneels down slowly. Mr. Owens, right in there, bam, bam, bam,
19 bam.

20 Mr. Worsham had the most time of all. Drives around the
21 block, drives up, parks, sees the scene, four officers,
22 suspect on the ground immobilized, runs over. He had plenty
23 of time to think about it before he threw those five knee
24 strikes. This is not split-second reaction. This is
25 considered proaction.

Closing Arguments by Mr. Todd

1 I've thrown a lot at you like I did earlier. But at the
2 end of the day, on the question of objective reasonableness,
3 the question of liability in this case, nothing should
4 ultimately distract you from the fact that these defendants,
5 along with two nondefendants, pinned Mr. Wyatt to the ground,
6 immobilized his left arm, immobilized his back and legs -- his
7 right arm was already immobilized by his own body -- peeled
8 his head back and proceeded to pummel him when he was utterly
9 defenseless. That, I would submit to you, is the definition
10 of objectively unreasonable force.

11 If you agree with that, we move on to damages. I said at
12 the outset we would ask for compensatory damages against all
13 the defendants and punitive damages against Mr. Worsham. I'll
14 take them in turn.

15 Compensatory damages. As His Honor noted while he was
16 reading you the instructions, we haven't submitted a claim for
17 Mr. Wyatt's medical bills or his costs or anything like that.
18 Mr. Wyatt is a poor man; he couldn't afford to pay his medical
19 bills. There's no claim to be made.

20 What he does claim is a claim for pain and suffering.
21 The law, as His Honor instructed you, doesn't require proof of
22 a specific amount. It's up to you in your discretion to
23 determine an amount reasonable to compensate him for the
24 injuries he suffered then and continuing through today, and,
25 to the extent you find them, continuing into the future.

Closing Arguments by Mr. Todd

1 We respect your judgment in this matter. We respectfully
2 suggest you consider an amount up to \$100,000. I appreciate
3 that's a substantial sum of money, but recall the injuries
4 that were inflicted on Mr. Wyatt. The left side of his face:
5 Road rash to be sure. Perhaps that's legitimate from a tackle
6 but also blows from a fist.

7 The right side of his face: Three discrete impacts of
8 blunt force trauma that could only have been caused by a knee
9 in this scenario. Broken rib. Collapsed lung. The suffering
10 in the emergency room. The inability to breathe. While he
11 was on the side of the road and at the hospital, Mr. Wyatt
12 said, "I can't breathe. I can't breathe." They couldn't lay
13 him down to suture him up because his oxygen was so low.

14 Have his external injuries cleared up? Sure, absolutely.
15 Bruises go away, bones heal, lungs close up again, absolutely.
16 It takes some time, a lot of suffering, a lot of pain.

17 And some of that pain has continued. Yes, he suffered
18 headaches when he was a child; but as he testified, it went
19 away over time. Now, since this event, it's back almost
20 daily, excruciating migraines. It's just a headache. But if
21 you've had migraine headaches, you know they really hurt.

22 His eyesight never fully recovered. You could dismiss
23 them as just, oh, floaters. It's blind spots, substantial
24 blind spots in his eyesight that he continues to suffer to
25 this day.

Closing Arguments by Mr. Todd

1 And then he testified about his stress. Call it
2 posttraumatic stress, traumatic brain injury, the effects of
3 the beating. You heard a lot of talk about concussions, the
4 long-term effect of concussions. That's what we're talking
5 about here.

6 Dr. Smith, a highly credentialed, experienced emergency
7 room doctor, an emergency medical expert walked you through
8 these injuries. And you may have noticed, his testimony was
9 un rebutted. There is no defense expert on medical bills or
10 medical testimony. His testimony stands un rebutted in this
11 case.

12 Lastly, we come to the issue of punitive damages. I'll
13 try to wrap up quickly, I know I'm taking your time here.
14 There are really three categories of officer in this case,
15 from least to most.

16 This morning you heard from Mr. Shelton, the captain,
17 Major Nicholson. They intervened in the situation, they used
18 appropriate control tactics: knee on the back, pin the arm.
19 They acted appropriately in this case in that they did not use
20 any force.

21 Mr. Wyatt and Mr. Owens used excessive force, they did,
22 punches to the face, punches to the back. That's more than
23 Mr. Shelton or Mr. Nicholson. But it is orders of magnitude
24 less than the force used and the damage inflicted by
25 Mr. Worsham. And that's why we're seeking punitive damages

Closing Arguments by Mr. Todd

1 solely against him.

2 His Honor instructed you can consider both his actions in
3 this case and his history. And that explains Tuesday, why we
4 spent so much time going through that history.

5 You already know what happened in this case. Mr. Worsham
6 inflicted more injury, more pain, used more force on the least
7 amount of information.

8 Recall where he was. He was up on Memorial Drive. He
9 had seen the hands are empty. He had seen Mr. Wyatt running
10 normally. He didn't offer you a, "I saw his hand by the
11 waistband, he was running funny" excuse. He said he was
12 running normally.

13 So he drives around, he is not communicating with the
14 officers in the pile, he is not hearing anything that's being
15 said. He arrives in his car, near that pile of men, knowing
16 hands empty, running normally. No one communicates any
17 additional information to him. No one yells out "gun" or
18 anything else, never saw hands, running funny. All he knows
19 is empty hands, running normally. He runs over to the pile
20 and he sees hand underneath, officer still hands-on.

21 But compare his behavior to what the other defendants
22 were doing at that point. After Johnny Owens' punches, all
23 the other officers stopped using force. There is a measurable
24 gap in time between -- you can see it on the video here.
25 Mr. Owens stops punching, they're all just holding. Arm lock

Closing Arguments by Mr. Todd

1 going on, arm being restrained, right arm being restrained,
2 and then suddenly boom, boom, boom, boom, boom. That's a
3 substantial and powerful difference. And where did those
4 blows go? As I said earlier, the only evidence is they went
5 to the neck or the head.

6 Now, Mr. Worsham knew the relevant standards. There's no
7 question he was unaware of the standard of law or Mr. Wyatt's
8 rights. He was trained and trained repeatedly; trained at the
9 academy, trained at Danville, trained in Pittsylvania County,
10 sent to remedial training. He knew the standards, he just
11 chose not to apply them.

12 And he chose not to apply them at a time when Mr. Wyatt
13 was laying pinned on the ground with his head exposed. That
14 makes a big fat target, and boy did he hit it.

15 If you agree that punitive damages are appropriate in
16 this case based on that evidence, you can then consider prior
17 history. I won't belabor this; you got a full day of it. But
18 the evidence shows that Mr. Worsham has a long history of
19 aggressive behavior towards the public and questionable use of
20 force, and contempt towards efforts to correct his behavior.

21 Going back to Danville, he testified the chief required
22 him to wear an audio recorder to tape every single interaction
23 with the public on account of his aggressive behavior. He
24 chose to respond to this requirement not in changing his
25 behavior, but by doing less, by stopping interacting with the

Closing Arguments by Mr. Todd

1 public, staying in his car, just doing the bare minimum.

2 Chief Broadfoot explained to him how the recorder would
3 be helpful. "It would create evidence if you're being falsely
4 complained on." Because, recall, he had denied every single
5 complaint against him ever. Was his reaction to welcome that
6 evidence, welcome that corroboration? No, it was first to not
7 create it by not interacting with people, and then it was to
8 ignore the instructions and not tape the interactions. When
9 the recorder was off, the old Worsham resurfaced.

10 Ultimately, he leaves Danville, he comes to the County.
11 And again, he has a history of use of force with the County.
12 Again, I won't belabor it, but Sergeant Young detailed a
13 number of investigations into Mr. Worsham under similar
14 circumstances, similar events, similar excuses given, similar
15 questionable use of force.

16 You probably noticed that all of those events were
17 ultimately ruled non-substantiated, not innocent. Not guilty,
18 sure, but not innocent. His own account of what happened was
19 insufficient. It was not sufficiently credible to produce an
20 exoneration of his behavior. And, of course, in none of those
21 instances was there an audio recording or a video recording,
22 as there is here today.

23 What does come through is a pattern of knee strikes,
24 fists, fear of gun. What also comes through is a pattern of
25 contempt towards attempts to fix his behavior.

Closing Arguments by Mr. Todd

1 Chief Taylor -- Sheriff Taylor, excuse me -- at least
2 sent Mr. Worsham to remedial use of force training. Scott
3 Wyatt told you about the subjects they covered. Full day,
4 lots of things, different scenarios, types of force, use of
5 force, appropriate use of force. Mr. Worsham took a single
6 lesson, a single lesson away from that school: Throw knees
7 harder. Didn't even appreciate what Scott Wyatt did. They
8 were talking about standing up, as Mr. Waller explained, hit
9 someone here, deadens the leg, they go down.

10 Throw knees harder; knees he subsequently used on Linwood
11 Brandon. And when questioned by Sergeant Young about that,
12 his justification was the class. He mockingly stated, "That
13 school, that lovely school taught us to throw knee strikes."
14 He used knee strikes on Mr. Brandon and he used them on
15 Mr. Wyatt's face.

16 I've been talking a long time; I will wrap up.

17 Mr. Wyatt is a simple man. Mr. Wyatt is a poor man. And
18 now, as he has testified, Mr. Wyatt is an incarcerated man,
19 but a man nonetheless, a man with the same rights as you and
20 I, as any of us.

21 These rules, these constitutional rights, these practices
22 that we're talking about are designed to protect not just some
23 of us but all of us.

24 Process, due process is what we are entitled to: arrest,
25 adjudication, and then punishment. This was not a process.

Closing Arguments by Mr. Guynn

1 This was vigilantism. This was judge, jury, and executioner.

2 This was objectively unreasonable force.

3 I thank you for your time. I thank you for your
4 patience. Thank you.

5 THE COURT: Mr. Guynn.

6 MR. TODD: I'm sorry, Mr. Guynn. Before you stand
7 up, I forgot one thing. The amount of punitive damages we
8 suggest that you consider is \$500,000. Thank you.

9 MR. GUYNN: Ladies and gentlemen, we began Tuesday
10 morning -- somehow not beginning on Monday has gotten me off
11 on my days. I'm still convinced it's Wednesday, and I
12 apologize if I refer to it that way.

13 I started off by telling you that, among other
14 things, that Michael Wyatt controlled his own destiny on
15 July 3rd. He controlled his own destiny the night of
16 July 2nd.

17 That must have been an interesting night. It must
18 have been an interesting night the way he describes it. It
19 must have been a very interesting night from the standpoint of
20 the guys that run the PAK store. Nonetheless, it happened.
21 You heard him testify that it happened. And then the report
22 went out, and the report received on the morning of July 3rd
23 was he is suspected of an armed robbery and fired a gun. Now
24 he wants to quibble about that, but, in fact, he was convicted
25 of an armed robbery.

Closing Arguments by Mr. Guynn

1 But what I told you the other day was this: If in
2 the hotel parking lot he hadn't jumped in his car and ran
3 through the Taco Bell and over the curb, we wouldn't be here.
4 If he had stopped anywhere in that 3-point-some 9 miles when
5 the lights and siren were behind him, we wouldn't be here. If
6 he had not jumped the concrete median, driven the wrong way
7 both on the street and up the off-ramp, we wouldn't be here.

8 Heck, if he had pulled in the parking lot and stayed
9 in his car, you know, put his hands out the window -- I think
10 that's what Lieutenant Wershbaile was talking about in the
11 felony stop. If he had stayed in his car and allowed them to
12 use the speaker to say, "Don't move. Put your hands out the
13 car," we wouldn't be here.

14 So he made all those decisions, and now he's going to
15 say, "You guys used excessive force when you chased me.
16 Notwithstanding the fact that you understood that I used a gun
17 the night before, and notwithstanding the fact that I was
18 running in a way that made you think I had a gun, and
19 notwithstanding the fact that the job you do every day is one
20 of the few in our country where you are not guaranteed of
21 going home."

22 Most of us know what time we're going home.
23 Sometimes it doesn't work that way for guys who do what my
24 friends Robert, Johnny, and Scott do, and in situations where
25 they think you have a gun and you react to that and don't

Closing Arguments by Mr. Guynn

1 appreciate the concern they have that brings us together
2 today, this type of situation.

3 Ladies and gentlemen, we know, we know what happens
4 when police officers yell "gun." This is a completely
5 different case if they yell "gun." Mr. Wyatt wouldn't be here
6 to testify. When the police officers hear "gun," they're
7 going to pull theirs out, and you know what's coming. That's
8 why they were so circumspect in not yelling "gun" until they
9 saw the darn thing. And it's also why they wanted that arm
10 out from under there so bad. And what are they to think when
11 you don't give them your arm?

12 One of the instructions tells you, decide whether the
13 use of force was excessive from the perspective of a
14 reasonable officer facing the same circumstances. That's
15 objective reasonableness. That's putting yourself in that
16 officer's shoes. What is that perspective? I would submit to
17 you that that perspective is a fellow who used a gun the night
18 before, who is apparently incredibly desperate, so desperate
19 that he did all of those things, got out and tried to run.
20 Incredibly desperate.

21 And yet when he won't give you his arm, nobody has
22 come in here and said, "Well, what should you do if he doesn't
23 give you his arm?" Just hold him down and wait? He will
24 eventually do it? What's an hour, maybe two? Is that really
25 what we want?

Closing Arguments by Mr. Guynn

1 Lieutenant Wershvale said this morning the longer
2 this thing goes on, the worse it gets. The longer these
3 instances go on, the worse they get.

4 So everything that you hear and have heard from
5 Mr. Wyatt, from Mr. Waller telling us, it's going to take more
6 time. "Well, we'll work on it, work, work. We'll pull." The
7 idea about Captain Nicholson pulling on his arm, couldn't get
8 it out and somehow did the right thing by stepping away, well,
9 he stepped away so somebody else could get the arm out. That
10 has to be obvious, doesn't it? He couldn't get it out, he was
11 assuming that somebody else would?

12 So curiously, what happens? Robert Worsham comes in,
13 uses a knee and the arm comes out, which, as you understand
14 from what Lieutenant Wershvale said this morning, there's -- I
15 will never pronounce it, radial plexus, whatever, but he said
16 if you hit it, that will give you the opportunity for the arm
17 to come out.

18 Now, just made a big thing about Robert Worsham this
19 morning saying, "I didn't hit him in the head." You know why
20 Robert was able to change that testimony today? Dr. Smith.
21 The doctor that they say shows that he hit him in the head
22 actually shows that he hit him in the ribs. Remember
23 yesterday, talked about the broken ribs and he said didn't
24 happen in the fall because it would have been more than one
25 rib broken. This happened from a blow.

Closing Arguments by Mr. Guynn

1 What, you've seen in the video 12 times, 15 times?
2 You've seen it a lot. Did you see anybody other than Robert
3 Worsham throw a blow to Michael Wyatt's right side? No. So
4 who broke his rib? Worsham.

5 Where was the rib broken? I asked him yesterday,
6 "Dr. Smith, where is that rib?" It's under your arm. It's
7 under your arm, down here. That's where Worsham hit him.
8 It's the only explanation for the broken rib.

9 Speaking of Dr. Smith, he testified there were no
10 bruises recorded at the hospital on Michael Wyatt's back. I
11 had -- I will say it this way without -- but apparently Johnny
12 Owens didn't hit him hard enough to bruise him.

13 Scott Wyatt got there first. And as Lieutenant
14 Wershbaile said, we're talking about a short distance, a quick
15 run. This idea that you wouldn't chase somebody you thought
16 had a gun, well, doesn't it depend? If they're back in the
17 corner, probably not. But if your back is to me, and you're
18 like this, and there's this distance -- I'm sorry. If your
19 back is to a police officer, like Scott Wyatt, then, yes, he
20 is going to close that ground on you. Am I going to do it?
21 Not my job. That's why we have Scott Wyatt.

22 It is unfair to label these guys who showed courage
23 in chasing him as somehow not believing he had a gun. It's
24 unfair.

25 So what did these guys know? And Lieutenant

Closing Arguments by Mr. Guynn

1 Wershbale said you had to take that into account. The
2 instruction says you have to take that into account. They
3 knew what they were told the night before: fired a gun,
4 warrant for armed robbery, consider him armed and dangerous.

5 He then, when they locate him, seeks to escape. It's
6 another one of the categories telling them that this idea of
7 being careful around him is a good idea. So they get more
8 than one person; they make sure that there's enough of them to
9 take him into custody. Not in dispute; nobody argues that
10 part of it didn't happen.

11 The video doesn't show the tackle. But after that,
12 it shows you the blows from Johnny Owens, which didn't get his
13 arm out, that don't bruise him. Shows you Scott Wyatt and
14 shows a couple of blows. Yes, his answer was four to eight.
15 But the video, as the coaches used to say, "The eye in the sky
16 doesn't lie." The video doesn't really show four to eight
17 punches.

18 Were they up around the head? Yes.

19 Did Lieutenant Wershbale say, "Gosh, he shouldn't
20 have done that?" No. He said it was reasonable given what he
21 knew.

22 Did Robert Worsham -- was Robert Worsham's use of
23 force reasonable? Yeah, obviously, because he hit him in the
24 ribs, didn't he? That's the only person that hit him on the
25 right side; it had to be. Unless, of course, they're going to

Closing Arguments by Mr. Guynn

1 stand up in a minute and say, "Well, you probably shouldn't
2 believe that part of Dr. Smith's testimony." It was their
3 witness.

4 I don't know what of 3.9 miles of math in ten
5 minutes, I don't know what that means. All I can tell you is
6 if you don't think it is a serious pursuit when they jump a
7 concrete median and go the wrong way and go the wrong way up
8 an exit, I can't add to that. I just can't add to it.

9 This is the difficult spot for police officers. Once
10 you're there, how do you get them handcuffed and get them
11 under control? You heard that term over and over and over.
12 And when are they under control? They're under control when
13 they're handcuffed.

14 Lieutenant Wershbaile pointed out that what they did
15 was reasonable because it had to be done in order to get him
16 handcuffed, and you didn't want to let it go any longer than
17 you had to.

18 There is nothing inconsistent with yelling "Stop
19 resisting and give us your arm," when the resistance is you're
20 not giving them your arm. If you stop resisting and allow
21 your arm to be pulled out, it's very consistent. Michael
22 Wyatt knew that.

23 They were yelling over and over at him, "Stop
24 resisting. Give us your arm." How do we know that would have
25 made a difference? In the video you'll see -- I think it's

Closing Arguments by Mr. Guynn

1 Johnny Owens on the left-hand side, in the white T-shirt,
2 reach like this, go like this, and then this.

3 (Demonstrating.) He has got his handcuffs out and he is
4 handcuffing him, and everybody steps away immediately.

5 So how do we know that this is not some way of being
6 a vigilante or how do we know that it's not to punish him?
7 It's because once they got him cuffed, they achieved their
8 objective and nothing else happened. These defendants didn't
9 have any further contact with him.

10 Dr. Smith never treated Michael Wyatt. He talked to
11 him, he said, what, in October? And I think he said 2016,
12 which would have been about four years -- more than four
13 years -- gosh, time flies -- more than four years after the
14 incident. So he assumed, I guess, that he could rely on what
15 Michael Wyatt told him four years after the incident about his
16 health and about whether he was good, bad, or indifferent.
17 And I would just leave it to you to decide whether or not that
18 is a good move, whether relying on Mr. Wyatt's credibility is
19 the right move in this case.

20 Dr. Smith said, in addition to there being no back --
21 no bruises on the back, had no concussion. Does that really
22 in this day and age of concussions, does that really ring a
23 bell, that somebody who supposedly gave these five incredibly
24 powerful knee strikes right to the head, the dude has no
25 concussion? Really?

Closing Arguments by Mr. Guynn

1 The CT scan of the head, he said, was normal. This
2 isn't somebody who has had a huge blow of the head. The CT
3 scan was normal.

4 Mr. Waller was -- you know, I'll just say it, slick.
5 He has got a slick presentation. If you are going to pay him
6 \$200 an hour, you ought to get a slick presentation. And it
7 was very easy, and I don't mean any -- I'm not casting
8 aspersions to my compatriots at the bar, but it very easy to
9 take a lawyer, who is not resisting you, in a suit, and lay
10 him face down and show you all this stuff. It is completely
11 different in a situation where somebody desperately doesn't
12 want to be taken into custody. Completely different. And I
13 would submit to you that if Mr. Beaton didn't want to be taken
14 into custody, it would have been not nearly as easy as that,
15 not nearly.

16 There has been, and it was -- I'm glad that the Judge
17 gave you the instruction about objections and the like. On
18 Tuesday, I took the character assassination of Robert Worsham
19 pretty personal because it's not about this case, because it
20 doesn't have anything to do with this case, and I thought we
21 were here to talk about this case. And that's why -- and
22 don't hold it against Robert or anybody else, that's why I
23 objected as much as I did. And I still think it's about this
24 case. I think that --

25 THE COURT: I don't know whether you're telling them

Closing Arguments by Mr. Guynn

1 the instructions are wrong or not.

2 MR. GUYNN: No. No. The instruction is absolutely
3 correct.

4 THE COURT: And also your personal feelings have
5 nothing to do with this case. Don't discuss the objections
6 with the jury. We've ruled on them. I don't think it's
7 appropriate to --

8 MR. GUYNN: I wasn't planning on it, Your Honor. All
9 I was saying was I didn't want the jury mad at me for
10 objecting.

11 THE COURT: I told the jury that, and they understand
12 that.

13 MR. GUYNN: In Robert's career in Danville, as he
14 testified, he worked some pretty bad areas. You were told a
15 few minutes ago that when he was wearing the recorder, that he
16 didn't work. That isn't what he said. What he said was, "I
17 was not going to get out at the corner where I suspected that
18 there were these drug deals going down and go over and try and
19 break them up if I was going to get complaints about it."
20 That's what he stopped doing.

21 He did his job. He patrolled, all that, but he
22 concluded that, you know, if he was going to continue to be --
23 to have to wear a recorder because he did that part of his
24 job, then he simply wasn't going to do that part. Nobody else
25 was doing it. And I think there's some concern whether

Closing Arguments by Mr. Guynn

1 anybody else is doing it today.

2 I would also point out that with all the evidence
3 that has come in, there was one other piece of evidence or one
4 complaint that Robert had used a knee strike previously. If
5 you look at the -- if you recall the three that were talked
6 about, that was it. So this isn't a situation where he is out
7 here indiscriminately throwing knee strikes and the like.
8 This is a situation where in this case it worked, they got the
9 arm out.

10 I'm not going to tell you that Mr. Wyatt -- that the
11 pictures lie. Mr. Wyatt's face, yeah, he had a black eye and
12 he had the road rash. I disagree with Dr. Smith about having
13 some traumatic brain injury. There was no diagnosis of that
14 here in Danville, at the hospital, and I don't think you get
15 to say that four years after the fact.

16 He, as the doctor said, probably within six weeks all
17 of that had healed up. He has made a good recovery. He
18 didn't have broken bones in his face, he doesn't have
19 disfigurement. He looked like a guy that had fallen and hit
20 his face on the asphalt. And as we know, he looked like a guy
21 in this case where he got his arm under him and wouldn't pull
22 it out. He wouldn't give his hands up to the police.

23 In order to even get to the damages part, you have to
24 figure out whether or not there's liability. I would submit
25 to you that once you look at this and review the instructions

Closing Arguments by Mr. Guynn

1 that the judge has given you on what the law are and compare
2 to that what we all heard the facts to be, that you will find
3 there is no liability in the case, and, therefore, you don't
4 get to damages.

5 But I would be remiss and wouldn't be representing my
6 clients fully if I didn't at least mention to you that, in
7 considering damages, you have to look at everything that the
8 instruction says, and realize that there's really very little
9 here as far as expenses or other things that you can actually
10 put a number on. I don't know how you would go about giving
11 damages in a case like this, under all these circumstances.

12 The burden of proof in the case lies with the
13 plaintiff. That means, as the Judge said, you know, it's kind
14 of like a scale, and if it's 51 percent, then that burden of
15 proof has been carried. If it's even, if it's 50/50, if you
16 just can't make up your mind, in that situation the decision
17 goes to the defendants, because the burden of proof is on the
18 plaintiff.

19 Now, you know that the burden of proof lies there for
20 a number of reasons: They got to go first; we went second
21 with our evidence, went first today; and their attorney gets
22 to make a rebuttal closing argument after I finish. That's
23 all part of having the burden of proof.

24 This is the last time I'm going to say anything to
25 you. At least you didn't get up and cheer; that's a good

Rebuttal Arguments by Mr. Todd

1 thing. But I would ask you this: After that argument is
2 complete, at least give some thought to, I wonder what could
3 have been said in response to that, because I don't have a
4 chance to come back and say anything else to you.

5 The Judge is going to explain the verdict form to
6 you. I would ask that, as you listen to it and when you go
7 back and look at it, you figure out, first, that there's no
8 liability in this case on behalf of these officers, and then,
9 second, how to fill out that verdict form to show that you're
10 finding in favor of the defendants.

11 We appreciate your service in this case. We
12 appreciate the time and attention that you've given our case.
13 Thank you.

14 THE COURT: Mr. Todd.

15 MR. TODD: Just a few quick final closing points.
16 First, everything that came before in the parking lot. Was
17 the chase serious? Yes. And I didn't mean for a second to
18 suggest otherwise. Is armed robbery serious? Yes. And I
19 didn't for a second mean to suggest otherwise. But do these
20 things, criminal things or stupid things, justify any and all
21 use of force? No.

22 Look at what happened in the parking lot.

23 Second, what did happen in the parking lot? The use
24 of force. The only use of force I want to touch on is the
25 question of the rib and the knee. Interesting the way the

Rebuttal Arguments by Mr. Todd

1 testimony plays out. Maybe you can knee someone in the rib,
2 through an arm that's still here. You know what? I'll give
3 Mr. Beaton that one, one knee, maybe two.

4 But what remains unexplained is the right side of
5 Mr. Wyatt's face. Three instances of blunt force trauma. The
6 only thing that could have caused those was the knee. That
7 leaves two for the road.

8 Third, the experts, Wershbale and Waller. I like
9 Lieutenant Wershbale, seems like a good officer. And his
10 generalized testimony about police practices generally was
11 interesting, informative, and largely complied -- or comported
12 with what Mr. Waller told you. What wasn't so interesting or
13 helpful was really his testimony specifically about this case.

14 As it turned out, he didn't know that much about this
15 case. Hadn't read the depositions, hadn't talked to the
16 defendants, didn't sit here and listen to the testimony. And
17 he testified -- the most important thing he told you was that
18 if he knew that knees had been thrown or fists had been thrown
19 to the head or neck area, that would have changed his opinion.
20 He didn't hear the testimony on whether that actually
21 happened. You did. You know.

22 Still on the experts. Mr. Guynn stood up here just
23 now and said no one came in and explained to you how they
24 should have gotten that arm out. I guess they just sit there
25 and wait for it to come out. No. Both experts explained to

Rebuttal Arguments by Mr. Todd

1 you the proper techniques for safely and calmly removing that
2 arm, removing the gun, if there is a gun, which of course
3 there wasn't, and doing it in a safe and controlled manner
4 without endangering the officers or Mr. Wyatt. That testimony
5 was here and you heard it.

6 Fourth, how the fight ends. Were the knees
7 effective? Did Mr. Worsham hit that nerve here and the arm
8 went dead and out it came? There's no testimony to support
9 that. There is testimony to support that Mr. Wyatt got hit in
10 the head, whether he was unconscious or not, certainly stunned
11 enough for that arm to come out. Equally effective ending to
12 the fight.

13 Lastly, remember what I told you at the beginning.
14 These officers held him down and beat him at a time they
15 thought no one was watching. They didn't know the camera was
16 rolling. They didn't know not just one but two police
17 cruisers rolled up and were videotaping.

18 You know, police officers have a tough job, no
19 question. Go out every day, as Mr. Guynn said, and risk their
20 lives, and I take that very seriously. But practices,
21 procedures, and constitutional norms are there for their
22 protection and ours. The fact that a job is risky does not
23 mean you can do it any way you want. You still have to comply
24 with the law. To protect citizens and to protect good
25 officers, that law should be enforced.

1 The only question for you here is was the force here
2 in the parking lot, by these defendants, on Mr. Wyatt
3 objectively reasonable or excessive? I think the evidence
4 supports a verdict for the plaintiff. Thank you.

5 Thank you, Your Honor.

6 THE COURT: All right. Members of the jury, you've
7 heard all the arguments, and upon retiring to the jury room,
8 you should select one of your number to act as your foreman or
9 forewoman who will preside over your deliberations and will be
10 your spokesman here in court.

11 The form verdict has been prepared for your
12 convenience.

13 If you would put up the verdict form.

14 You will notice on the form that you consider each
15 defendant separately. And the questions are, do you find
16 Defendant Owens used excessive force? And you go to answer
17 that yes or no. And Defendant Scott Wyatt, yes or no? And
18 Defendant Worsham, yes or no? And if all of your answers are
19 "no," you just have your foreperson sign the verdict and
20 notify the marshal that you've finished.

21 But if your answers are -- if you answer the question
22 under Roman numeral I as "yes," then you proceed to Roman
23 numerals II and III regarding damages. That if you answered
24 "yes" to any questions I, II, or III, then you proceed to the
25 damages issue.

1 With regard to the compensatory damages, I instructed
2 you on the manner how you should consider arriving at those
3 damages. You should assess the damages that you find
4 according to -- as to each defendant. If you find only
5 against one defendant, then it would be -- of course,
6 100 percent of any damages that you award would be against
7 that defendant.

8 Now, with regard to punitive damages, you would only
9 consider those with regard to Defendant Worsham. And if you
10 do decide that punitive damages -- under the instructions
11 punitive damages should be awarded, you should answer the
12 questions and put in the amount you find to be the appropriate
13 amount considering the instructions.

14 Now, you will take the verdict form to the jury room,
15 and when you've reached a unanimous agreement as to your
16 verdict, you will have your foreperson fill it in, date and
17 sign it, and then return to the courtroom.

18 If during your deliberations you should desire to
19 communicate with the Court, please reduce your message or
20 question to writing, signed by the foreperson, and pass the
21 note to the marshal, who will bring it to my attention. I
22 will then respond as promptly as possible, either in writing
23 or by having you return to the courtroom, so that I can
24 address you orally.

25 I caution you, however, with regard to any message or

1 question you might send that you should never state or specify
2 your numerical division at the time.

3 It now seems to be about 4:00 o'clock, and I would
4 like for you to deliberate as long as you wish to. We can
5 come back tomorrow. And I told you, you can leave every day
6 at 5:00 o'clock. If all of you want to deliberate past 5:00
7 o'clock to try to resolve the case tonight, you may do so.
8 But don't try to rush to reach a verdict just so the case can
9 be over. If you need to, you can come back tomorrow. No
10 pressure on you to finish from the Court or anyone.

11 But at about 5:00 o'clock, I wish you would send me a
12 note and tell me whether you wish to stay for a while. And if
13 you need food or anything, if you decide you want to stay, let
14 me know if you want a sandwich; we can, of course, get that.
15 If you need to call someone at home, tell them you're going to
16 be late, we can arrange for that. I want you to take all the
17 time this case needs. Don't feel any pressure to remain after
18 5:00 o'clock. And that means pressure from anybody on the
19 jury.

20 So I'm going to let you go back to the jury room.
21 You will have in the jury room the exhibits that have been
22 admitted into evidence and also the jury instructions that
23 I've given you. And I think we're going to have now -- you'll
24 have an iPad with those exhibits about the chase scene and
25 that sort of thing and the scene in question. I think it's

1 Exhibits 1, 2, and 3; is that right?

2 THE CLERK: Yes, sir.

3 THE COURT: Anyway, are you going to show them how to
4 use that?

5 INFORMATION TECHNOLOGY SPECIALIST: (Nods head up and
6 down.)

7 THE COURT: You want to do that now?

8 INFORMATION TECHNOLOGY SPECIALIST: The iPad is
9 locked down to one specific application that has the three
10 videos on it. If you want to select one of the videos, you
11 tap on it, it will be played. And then just like any other
12 iPad app, you have access to pause it, scroll through the
13 video.

14 If you like, we also have -- way down here in the
15 bottom corner is a lock. You can enhance the playback speed
16 if you like.

17 If you want to switch to another video, simply tap
18 "done," and you can select another video, watch that video.

19 In the bottom left-hand corner is the audio control.
20 So if you want to turn the volume up, simply turn it up; turn
21 it down, you can turn it down. If you need to charge it,
22 there will be a charger and cable as well.

23 THE COURT: And if you have any trouble and you want
24 to see it, you can't get it to operate, just notify the
25 marshal and let him bring it out and cut it on for you, at

1 least cut on the video you wish to see.

2 So you may retire to the jury room.

3 (Jury out at 4:05 p.m.)

4 THE COURT: All right. I want to thank all of you
5 now for the civility that has been shown to the Court and each
6 other. It made it a very pleasant case to try. And both
7 sides I think were represented extremely well. I don't know
8 what anyone could have done better for their client than has
9 been done in this case. Thank you.

10 MR. BEATON: Thank you, Your Honor.

11 (Recess taken from 4:06 p.m. until 5:03 p.m. Court
12 reconvened outside the presence of the jury.)

13 THE COURT: I have a note from the jury that says,
14 "The jury has decided to deliberate past 5:00. We'll update
15 around 5:30 or 6:00, if necessary." I can't read the name.
16 It looks like Chris or something, foreman. Chris Ford. He's
17 the guy that was sitting --

18 THE CLERK: Number 2.

19 THE COURT: Someone said he is a librarian? He
20 looked like he knew how to operate an iPad.

21 MR. BEATON: He was excited about that iPad.

22 (Recess taken from 5:04 p.m. until 5:47 p.m. Court
23 reconvened outside the presence of the jury.)

24 THE COURT: I have a note from the jury.

25 "We heard mentioned earlier in case that in Virginia,

1 quote, in control, end quote, means that suspect is handcuffed
2 and in custody. Is this law or just an accepted view across
3 Virginia law enforcement agencies?

4 MR. BEATON: No law I know of.

5 MR. GUYNN: I don't think we're allowed to say, are
6 we?

7 THE COURT: I don't think in control, that in
8 Virginia "in control" means the suspect is handcuffed. We
9 tell them it's not law.

10 MR. BEATON: It's not even evidence, is it?

11 THE COURT: Well, I don't recall that. I recall
12 something being said about control.

13 MR. GUYNN: Both experts mentioned it.

14 MR. BEATON: Mentioned what?

15 MR. GUYNN: Having him under control.

16 MR. BEATON: But nothing to do with whether in
17 Virginia that's the standard.

18 MR. GUYNN: Right.

19 MR. BEATON: Yes, there was certainly discussion of
20 being under control, but not a specific Virginia rule of any
21 sort.

22 THE COURT: No. I mean I can give them another
23 instruction. I mean, I hate to just ignore the question. I
24 could say there's no evidence on the subject. There was no
25 evidence.

1 MR. GUYNN: But there was evidence on control.

2 THE COURT: There was evidence on control, but there
3 was no evidence concerning whether it was law or custom.

4 MR. GUYNN: Could we just say that the experts
5 addressed control?

6 MR. BEATON: I would really resist leaving any
7 impression that there is a standard out there, because it's
8 not a law or evidence that they've been told about.

9 MR. GUYNN: How about the only law comes from your
10 instructions.

11 THE COURT: Well, I could say "in control" is the
12 ordinary meaning which you would give to it. I mean the words
13 "in control" -- give the phrase "in control" its ordinary
14 meaning.

15 MR. BEATON: I just would hate to leave the
16 impression that that's the interpretation of some legal
17 standard that they have in mind.

18 THE COURT: Well, you know, I could say -- I think
19 the best thing is just to say "in control" has an ordinary
20 meaning, which we don't give them the definition for.

21 MR. GUYNN: I guess both experts haven't addressed
22 it.

23 THE COURT: Well, neither one said it was law.

24 MR. GUYNN: Right.

25 MR. BEATON: What about the sentence you suggested,

1 and, in addition, say, "There is no legal rule that you were
2 instructed about on this point," rather than just leaving them
3 to the instructions, which is -- which would require them to
4 go through it, hunting for something. We all know there is
5 actually nothing in the instructions, and that's what they
6 should apply.

7 THE COURT: What about just saying then, "I have not
8 instructed you that the law -- I've instructed you on the law,
9 what the law is applicable to the case"?

10 MR. GUYNN: Right.

11 THE COURT: "The words in the instruction that are
12 not defined are to be given their ordinary meaning."

13 MR. GUYNN: That's probably about all you can do.

14 MR. BEATON: Is that phrase in the instructions? Is
15 that phrase in the instructions?

16 MR. GUYNN: No, it's not in the instruction.

17 MR. BEATON: I have no objections with what you said.
18 I'm just worried that that's going to send them through the
19 jury instructions, and if we could clarify --

20 THE COURT: I would just say that, "I have not
21 instructed you" --

22 MR. GUYNN: They're going through the jury
23 instructions now.

24 THE COURT: "I have instructed you on the law
25 applicable" --

1 (Discussion off the record between the Court and the
2 law clerk.)

3 THE COURT: What about saying, "'In control' has no
4 special meaning"?

5 MR. TODD: Certainly constitutionally that's correct.
6 Constitutionally that's correct.

7 MR. GUYNN: But both our experts addressed it.

8 THE COURT: Well, they addressed it but they didn't
9 say -- the jury thing is wanting to know if "in control" means
10 that the suspect is handcuffed.

11 MR. TODD: If they're wondering if it's a
12 black-and-white test.

13 THE COURT: Yeah.

14 MR. TODD: And it's clearly not constitutional. It's
15 a part of practice.

16 THE COURT: Well, what I was suggesting, the phrase,
17 "If used, 'in control' will be given its ordinary meaning.

18 MR. TODD: That's the entire response?

19 THE COURT: Well, I would say, "I have instructed you
20 on the law applicable to the case. The phrase 'in control,'
21 if it was used -- if used during the trial, should be given
22 its ordinary meaning."

23 MR. TODD: How is the jury's question phrased again?

24 (Jury question is handed to Mr. Todd.)

25 MR. TODD: My concern is that that answer doesn't

1 answer the question.

2 THE COURT: Right.

3 MR. TODD: The answer to the question is "no." It's
4 not a legal term within the legal confines of this case. It's
5 one element through one piece.

6 THE COURT: It's neither law nor -- there's no
7 evidence that it is the accepted view across the state.
8 There's no --

9 MR. GUYNN: I thought Mr. Wershbale said that he
10 thought --

11 THE COURT: Well, you were just saying that --

12 MR. GUYNN: You didn't ask me.

13 THE COURT: Well, I was asking what --

14 MR. GUYNN: I don't think that we can --

15 MR. BEATON: I wonder if there's even any evidence.

16 MR. TODD: We had the discussion with both experts
17 whether they should testify to the law, and both experts were
18 told not to testify to the law. And their question goes to
19 what the law is, not police practice, which is one subset of
20 the applicable test here.

21 (Pause in the proceedings.)

22 THE COURT: All right. "I have instructed you on the
23 law applicable to the case. That is the only law you should
24 consider. You should give the testimony of any witness such
25 weight as you find it is entitled."

1 MR. TODD: The concern with that under this question,
2 Your Honor --

3 THE COURT: Sir?

4 MR. TODD: The concern with that, given this
5 question, Your Honor, is that, as I understand it, there is no
6 witness testimony on that point. Mr. Guynn made the argument
7 in his comments that control equaled handcuffing or
8 handcuffing equaled control. Then you instructed the jury --

9 THE COURT: You couldn't find the testimony in that
10 witness's --

11 THE COURT REPORTER: Control, regarding control and
12 handcuffing? It would take a little while to find it, but I
13 mean --

14 MR. TODD: I thought Mr. Guynn acknowledged it a
15 second ago.

16 MR. GUYNN: I think I did say something to that
17 effect in opening statement. But I think my expert said, in
18 his opinion, that the plaintiff would have been in control
19 when he was handcuffed.

20 MR. TODD: That's different.

21 MR. GUYNN: That's different.

22 THE COURT: That's not practice -- that's not a
23 commonly accepted definition among police departments.

24 MR. GUYNN: Right.

25 THE COURT: Why don't I say it's neither law nor --

1 MR. GUYNN: I thought what you had was right. I
2 think that's the correct statement, isn't it?

3 THE COURT: "Or an accepted view across law
4 enforcement agencies."

5 MR. TODD: It leaves open the implication that
6 there's evidence, Your Honor, which there is not. You've
7 instructed the jury that our arguments are not evidence, and
8 the jury is clearly confused on that point.

9 MR. GUYNN: They have the instruction.

10 THE COURT: "I have instructed you on the law
11 applicable to the case. That is the only law you should
12 consider. The words 'in control' are not to be given any
13 special meaning."

14 MR. TODD: I think that's appropriate as far as it
15 goes. I would also recommend the Court repeat the instruction
16 previously given that lawyer argument is not evidence, because
17 I believe that's where the confusion is coming from.

18 THE COURT: Well, I don't want to get into it too
19 much. What do you say?

20 MR. GUYNN: I don't think you should repeat any
21 instructions.

22 (Discussion off the record between the Court and the
23 clerk.)

24 THE COURT: Okay. This is what's going to the jury:
25 "I have instructed you on the law applicable to the case.

Verdict

1 That is the only law you should consider. The words, quote,
2 'in control' are not to be given any special meaning."

3 Where is the marshal?

4 THE CLERK: And I'm going to make copies, because
5 sometimes they can throw this in the trash.

6 MR. TODD: Thank you.

7 (Recess taken from 6:09 p.m. until 6:31 p.m.)

8 (Jury present.)

9 THE COURT: You may have a seat.

10 Have you agreed upon a verdict?

11 THE FOREPERSON: Yes, sir.

12 THE COURT: Would you hand it to the marshal.

13 (Verdict is handed to the Court.)

14 THE CLERK: Ladies and gentlemen, is this your
15 verdict?

16 THE JURY: Yes.

17 THE CLERK: *Michael Wyatt v. Johnny Owens, et al.* We
18 the jury unanimously find the following by a preponderance of
19 the evidence:

20 As to excessive force as to Defendant Johnny Owens:

21 No.

22 As to Defendant Scott Wyatt:

23 No.

24 As to defendant Robert Worsham:

25 Yes.

Verdict

1 Compensatory damages.

2 As a result of the excessive force used in
3 apprehending, arresting, and restraining Mr. Wyatt, he
4 sustained damages in the amount of \$50,000.

5 The compensatory damages are attributed to the
6 defendants in the following proportions:

7 Zero percent as to Johnny Owens.

8 Zero percent as to Scott Wyatt.

9 100 percent as to Robert Worsham.

10 Punitive damages as to Robert Worsham:

11 Yes.

12 If you decided not to award punitive damages, stop at
13 this point and return the form to the Court.

14 We, the jury, award Mr. Wyatt punitive damages
15 against Robert Worsham in the amount of \$100,000.

16 Signed by the foreperson, Christopher Ford.

17 Do you and each of you agree upon this verdict so say
18 you all?

19 THE JURY: Yes.

20 THE COURT: Any motion before the jury is discharged?

21 MR. GUYNN: Yes, Your Honor. I would move to poll.

22 THE COURT: Members of the jury, as your name is
23 called, if this is your verdict, say it is. If it is not, say
24 it is not.

25 THE CLERK: Prence Craft.

1 JUROR CRAFT: It is.

2 THE CLERK: Christopher Ford.

3 JUROR FORD: It is.

4 THE CLERK: Iris Gillispie.

5 JUROR GILLISPIE: It is.

6 THE CLERK: Richard Pike.

7 JUROR PIKE: It is.

8 THE CLERK: Connie Rogers.

9 JUROR ROGERS: Yes.

10 THE CLERK: Janet Taylor.

11 JUROR TAYLOR: Yes.

12 THE CLERK: Cynthia Thompson.

13 JUROR THOMPSON: Yes.

14 THE CLERK: Vanessa Waddell.

15 JUROR WADDELL: Yes.

16 THE COURT: Members of the jury, thank you for your
17 service. I appreciate it and I know everyone appreciates the
18 time you have spent on this and how much you've contributed.

19 And you're going to be excused at this time. And
20 thank you again. You may leave.

21 (Jury out at 6:34 p.m.)

22 THE COURT: Will there be any other motions at this
23 time?

24 MR. GYNN: Not at this time.

25 THE COURT: We'll recess court.

1 Court recessed at 6:34 p.m.)

3 CERTIFICATE

4 I, Judy K. Webb, certify that the foregoing is a
5 correct transcript from the record of proceedings in
6 the above-entitled matter.

8 /s/ Judy K. Webb

Date: 5/12/17